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No. 07-142

IN THE

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE
TO VETERANS CORPORATION, PETITIONER

v.

BILL WICKERSHAM; MAUREEN DOYLE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit departed from established principles that previously protected non-governmental organizers of public events and festivals like the Memorial Day air show from "state actor" status under 42 U.S.C. § 1983 and created a conflict with decisions from the Fourth and Sixth Circuits.

2. Whether the First Amendment allows the non-governmental organizers of public events and festivals such as the Memorial Day air show to choose their message without being compelled to include extraneous messages.

RULE 29.6

Petitioner has no parent corporations, and there are no publicly held companies that hold 10% or more of petitioner's stock

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INTRODUCTION

In a case that has drawn the attention of organizers of Memorial Day events, air shows, and other public events and festivals, the Eighth Circuit has broadened the scope of "state actor" liability under 42 U.S.C. § 1983 beyond accepted understandings. As a result of the Eight Circuit decision, non-governmental organizers of public events and festivals like Memorial Day air shows are faced with an all but impossible dilemma and an enormous financial risk. If they continue to rely on public services, especially police protection, will they become "state actors" under §1983 and lose their existence to back-breaking fee awards as they try to protect themselves from unwanted messages?

When confronted with substantially identical facts, the Fourth and Sixth Circuit came down on the side of non-governmental organizers and held that they do not become "state actors" under §1983. This Court needs to resolve this conflict and eliminate the uncertainty now hanging over public events and festivals all over the country.

In addition to the opportunity to resolve the "state actor" issue and settle the conflict between the circuits, this case also presents a unique opportunity for the Court to clarify the scope of First Amendment rights of organizers of public events and festivals to their own message and their freedom from unwanted messages. The Eighth Circuit unduly restricted the First Amendment principles set out in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), by adding "disruption" and

"dilution" tests that are not found in *Hurley* and are inconsistent with *Hurley's* principles. Further, the Eighth Circuit deprived persons of *Hurley's* protections by treating the nonpublic forum for a Memorial Day event as if it were a commercial shopping center. The Court's review is badly needed to protect commemorative festivals from losing their identity.

OPINIONS BELOW

The order of the United States District Court for the Western District of Missouri granting a preliminary injunction is reprinted at App. 48a-115a and is published at 371 F.Supp.2nd 1061. The order and judgment of the United States District Court for the Western District of Missouri granting a permanent injunction is reprinted at App. 21a-47a and is not otherwise published. The Eighth Circuit decision is reprinted at App. 1a-20a and is published at 481 F.3d 591. The court of appeals' order denying rehearing and rehearing en banc is reprinted at App. 116a and is not otherwise published.

JURISDICTION

The Eighth Circuit rendered its decision on March 22, 2007, and denied rehearing and rehearing en banc on May 8, 2007. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law ... abridging the freedom of speech....

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,....

STATEMENT

A. Factual Background

Petitioner Memorial Day Weekend Salute to Veterans Corporation ("Salute") is a non profit organization whose purpose is to honor and remember veterans on Memorial Day weekend. Since 1993 Salute has staged its annual Memorial Day Weekend Salute to Veterans Air Show at the Columbia Regional Airport. The airport is owned by the city, but lies outside the city limits. The city gives Salute control over the secured tarmac[1] for the show. App. 2a-3a.

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[1] The "secured tarmac" where the static displays, exhibits and ceremonies are held during the air show is the paved area inside the airport security fence, next to the runway, which is used to park and taxi airplanes on days other than the air show. There are three gates for ingress and egress between the motor vehicle

The two day event is free and open to the public, and tens of thousands of people attend each year. In addition to feats of aerial acrobatics performed by military planes, the event features static airplane displays, exhibits by military recruiters, and food on the airport's secured tarmac. During the noontime hour each day there is a ceremony to honor fallen veterans at which the national anthem is played, the names of fallen Boone County service members are read aloud, and the air show's honored guests are introduced to the crowd. The stated purpose of the air show is "to honor and remember" service members, past and present. App. 2a-3a.

A resolution passed by the Columbia city council authorizes the city manager to execute a contract with Salute for exclusive control of the airport during the event, subject to the city's right to retake control in the event of an emergency. Salute does not pay for this use. During the remainder of the year the airport is controlled by the city, and the tarmac is not open to general public access. App. 3a.

Salute is responsible for deciding on the content of the air show, including the schedule of events, the list of honored guests, and the exhibits that will be displayed. Salute pays for liability insurance, the sound system, and the fees and incidental costs associated with the use of the military aircraft and does not receive any city funds. In order to produce the Memorial Day air show, Salute has 3,000 volunteers, 65 committee chairpersons, and raises about $100,000.00 in

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parking lots at the airport and the secured tarmac. App. 54a; Pl. Ex. 22.

donations every year for the event. City personnel retain responsibility for operating the airport during the air show. In addition, the city's airport manager has borne primary responsibility for developing the Ground Operations Plan for the air show and has coordinated with the Federal Aviation Administration to facilitate the air show's compliance with federal regulations. App. 3a-4a & 23a.

Salute includes a disclaimer in its media releases, stating that the air show is presented solely by Salute and should not be referred to as the Columbia Air Show or "any other designation that would imply it is hosted, organized, or in any way sponsored by the City of Columbia." The city's contract with Salute also states: "In no event shall the City and the Corporation be deemed or construed to be joint venturers or partners." App. 4a.

Salute imposes a number of restrictions on the behavior of the invitees on the secured tarmac during the air show. Some of the rules are for safety and others are limits on expressive activities, without regard to content. There are rules against soliciting, petitioning, leafleting, political campaigning, and unauthorized signs. These rules are widely publicized and often appear on Salute's media releases about the air show, on its website, and on signs at the entry gates. Salute's rules apply only within the secured tarmac area which is accessed through several gates. App. 4a-5a. Outside the gates, there are no rules limiting expressive activities – anything goes. App. 58a-59a. Wickersham and others protested on airport property outside the gates for a number of years, without incident. Wickersham depo. 53.

Columbia police officers provide security at the air show. Salute provides no reimbursement to the city for the officers' time. The local police captain has developed a security plan for the event each year which incorporates Salute's restrictions on expressive activity. In 2004, the police wrote an interoffice memo that officers were to advise persons that the tarmac area was private property subject to protesting and petitioning restrictions and to give trespass warnings prior to arrest. App. 5a.

In 2004, Maureen Doyle attempted to distribute antiwar fliers inside the secured tarmac. A Columbia police officer confronted her and stated that she would be arrested if she continued to hand out leaflets. Soon more officers arrived, and one grabbed leaflets out of her hands. Doyle then left the air show. App. 6a.

At that same air show, Bill Wickersham attempted to collect signatures inside the secured tarmac area on an initiative petition advocating renewable energy.[2] He knew there was a rule against petitioning on the secured tarmac. He wanted to be arrested. He was approached by a police officer who warned him that if he did not cease petitioning, he

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[2] Wickersham admitted in his testimony that his intention on entering the secured tarmac with a petition was to be arrested in order to make a point. Wickersham depo. 33-35. He further testified that he believes the air show is a psychological operation by the government to modify the behavior of the local audience, especially the youth, and what he really wants to do is "have a petition that petitioned against the military recruiting at the Memorial Day air show." Wickersham depo. 12-13.

would be arrested.[3] After Wickersham refused to obey the warning, the officer told him he was under arrest and took him to the police command post where he was issued a ticket for trespassing. Wickersham then left the secured tarmac. The ticket was never prosecuted. Pltf. Ex. 32a; Wickersham depo. 30-34.

The Columbia Regional Airport is the only facility in the county capable of hosting the Memorial Day air show. Boston depo. 107. Respondents and others have numerous public fora in and around Columbia for the expression of their ideas, including the city parks, the area in front of the post office, an amphitheater at the county courthouse, a speaker's circle next to the library at the University of Missouri, and all the public streets and sidewalks. Wickersham depo. 56-63. Salute has done nothing to restrict anyone's opportunities to express their ideas anywhere else at any time.

B. Procedural History

Wickersham and Doyle brought this action against Salute and the City of Columbia under 42 U.S.C. § 1983, seeking injunctive relief permitting them to distribute leaflets, circulate petitions, and engage in other expressive activities on the secured tarmac at future air shows. They alleged violations of their First Amendment rights to free expression, characterizing the air show as a public forum. They argued that although Salute was a private corporation, it was a

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[3] The officer noted in his report that the coordinator for Salute, Mary Posner, authorized the trespass warning. Pltf. Ex. 32a. She also signed a complaint.

state actor in its imposition of restrictions on free speech given the degree of joint participation between Salute and the city in staging the air show and enforcing the restrictions. They also claimed that by granting Salute discretion to determine who was arrested at the air show, the city has ceded a public function to Salute. App. 6a-7a.

On May 18, 2005 the district court granted a temporary injunction permitting plaintiffs to distribute leaflets and wear expressive clothing at the 2005 air show, but not allowing them to circulate petitions or engage in other forms of solicitation. App. 7a.

At the 2005 air show, leafleting and expressive clothing were permitted as required by the preliminary injunction; sign carrying was also allowed even though it had not been specifically addressed in the order. At the 2005 event, several persons handed out leaflets and carried signs inside the secured tarmac. One protestor ignored the district court's order to refrain from expressive activities during the solemn noon event. Several members of the public submitted written complaints to Salute about the presence of "protestors" on the secured tarmac.[4] App. 7a-8a.

On March 3, 2006, after additional depositions and hearings, the district court issued a permanent injunction which incorporated its earlier order by reference. App. 21a-47a. The district court ordered Salute and the city to permit leafleting, sign carrying, and the wearing of expressive clothing at future air

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[4] There were nine cards with critical comments about anti-war protestors at the air show. App. 26a-27a.

shows subject to reasonable restrictions on time, place, and manner, except during Salute's noontime ceremony, during which unauthorized expressive activities were not allowed. App. 8a-9a.

Salute appealed to the Eighth Circuit on both the "state actor" finding and the district court's failure to protect Salute's First Amendment right to its own message. The cou t of appeals affirmed. It found that Salute was a "state actor" for two reasons: 1) the role of the Columbia police in enforcing Salute's rules on the tarmac; and 2) the assistance provided by the city in planning and operating the air show. The court attempted to distinguish contrary decisions from the Sixth and Fourth Circuits — *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000); *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995). App. 13a-14a.

The court of appeals further concluded that Salute did not have a First Amendment right to control the expressive content of its own event under *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), because of the court's conclusion that Salute's message was not diluted by the presence of a small number of protestors and that such protests were not likely to be identified with Salute. App. 17a-18a. The court of appeals avoided the contention that Salute forfeited some of its right to deliver its own message unimpeded by others when it assumed the role of "state actor," a position that the plaintiff had advocated and to which the district court agreed, without citation of any authority. App. 16a-17a.

The Eighth Circuit also said that *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), was more relevant than *Hurley* on grounds that the Memorial Day air show is somehow akin to a commercial shopping mall. App. 18a.

The Eighth Circuit denied rehearing en banc. App. 116a.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons.

First, the opinion of the Eighth Circuit conflicts with *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000), and *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995), on the issue of whether the non-governmental organizer of a public event or festival becomes a "state actor" under 42 U.S.C. § 1983 if it avails itself of municipal services on public property and relies on the police to maintain order and enforce the rules. The *Lansing* and *Gaston* opinions are practically indistinguishable from this case on the relevant facts. This case presents the Court with a much-needed opportunity to eliminate conflicting circuit rules regarding state actor status on the part of non-governmental organizers of public events and festivals such as air shows, art and music festivals, book fairs, and the like.

Second, the Eighth Circuit's opinion is a radical departure from well-established First Amendment protections against compelled speech. The opinion unduly restricts *Hurley v. Irish-American Gay*,

Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). This case presents a unique opportunity for the Court to extend the First Amendment protections articulated in *Hurley* to commemorative festivals in general and Memorial Day events in particular, where people choose to assemble for a shared purpose and do not want to be compelled to include unwanted messages.

I. THE COURT SHOULD CLARIFY WHETHER THE NON-GOVERNMENTAL ORGANIZER OF AN EVENT LIKE A MEMORIAL DAY AIR SHOW OR OTHER PUBLIC FESTIVAL BECOMES A "STATE ACTOR" UNDER 42 U.S.C.§ 1983 IF IT AVAILS ITSELF OF MUNICIPAL SERVICES AND RELIES ON THE POLICE TO MAINTAIN ORDER AND COMPLIANCE WITH THE RULES.

People like to assemble for a shared purpose. Sometimes they gather in small groups with family and friends to celebrate a birthday, observe a wedding anniversary, or mark the years since graduation. Other times they gather in large crowds with people they hardly know but with whom they share a common interest or purpose. Most of the larger gatherings are held on public property, such as parks, streets, plazas, harbors or airports. All of them have one thing in common – somebody has to be in charge, to plan, schedule, finance, organize, support, carry out, and clean up. With large festivals, the organizer is typically a nonprofit corporation, staffed by volunteers and funded by contributors.

Even though a non-governmental organizer and its volunteers and contributors shoulder most of the

responsibilities for a public festival, there are certain functions that traditionally remain in government hands. Policing is one of those. Local and state police typically provide traffic and crowd control outside the venue. Inside, the police provide security and law enforcement. These responsibilities include enforcing laws against disturbing the peace, unlawful assembly, and trespass. A trespass violation occurs when an invitee fails to stay within the terms of the invitation by breaking one of the rules.

One of the issues before the Court is whether a non-governmental organizer loses its private status and becomes a "state actor" if it turns to the police to deal with a trespasser. A second issue is whether a non-governmental organizer becomes a "state actor" by working with the local government on the planning and staging of a festival.

Lansing v. City of Memphis, 202 F.3d 821 (6th Cir. 2000), and *UAW, Local 5285 v. Gaston* Festivals, 43 F.3d 902 (4th Cir. 1995), previously dealt with these issues and held that the non-governmental organizer did not become a "state actor" on either ground. The Eighth Circuit reached a contrary result. The decisions cannot be reconciled, and the circuits are clearly in conflict, as a reading of the cases will show.

Lansing was a §1983 action by a "street preacher" against the not-for-profit corporation that sponsored the "Memphis in May" festival. The preacher was asked to leave the event by a city policeman, just as Doyle and Wickersham were asked to leave the air show by a city policeman in this case. The reason in both cases was the same – failure to comply with the organizer's rules. The district court issued a permanent injunction barring "Memphis in May" from prohibiting plaintiff's preaching within the

festival area. The organizer appealed. The Sixth Circuit reversed, holding that the organizer was not a "state actor". Thus, the organizer could not be held liable for violating the plaintiff's First Amendment rights. In the course of its opinion, the Sixth Circuit reviewed the controlling authorities. On the "nexus test" to determine when there is a sufficiently close nexus between the state and the challenged action of the entity so that the action of the latter may be fairly treated as that of the state itself, the court of appeals found that "it is now well-established that state regulation, even when extensive, is not sufficient to justify a finding of a close nexus between the state and the entity." *Id.* at 830. The court further stated there is the equally well-established rule that "neither public funding nor private use of public property is enough to establish a close nexus between state and private actors." *Id.* The court also recognized the rule that "utilization of public services by private actors does not convert private actions to a state action," citing, among other cases, *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 612 (1991). Even though there was evidence that there were two public officials on the Memphis in May board, city and state funding, coordination with city agencies regarding the regulation of traffic and security at the festival, use of city property, use of city employees, and numerous other entanglements, the Sixth Circuit held that this did not establish a nexus between the organizer and the city. The division of labor actually demonstrated the independence of their operations. *Id.* at 832.

The Sixth Circuit specifically rejected the plaintiff's argument – which was a key element in the Eighth Circuit's reasoning as well – that the festival

organizer was a "state actor" because it called on the city police to enforce its rules by removing the plaintiff from the festival grounds:

> "Finally, neither the supply of police officers to help enforce Memphis in May's decision to remove Lansing, nor the city's instruction to its officers not to interfere with expressive speech activity outside the lease space, indicates a nexus sufficient to attribute Memphis in May's actions to the state." 202 F.3d at 833.

The court went on to say that if asking the police for assistance in this manner were all that was required to find state action, "then every private citizen who solicited the aid of the police in resolving disputes or in ejecting unwanted persons would be transformed into a state actor." *Id.*

UAW, Local 5285 v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995), was a §1983 action against the non-governmental organizer because it denied the union access to the festival grounds to distribute literature. The district court dismissed the suit upon a finding that the organizer was not a "state actor." The union appealed. In affirming the dismissal, the court of appeals observed that functions considered to fall traditionally within the exclusive prerogative of the State "compromise a very narrow category, subject to 'carefully confined bounds,'" citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163 (1978).

After reviewing Supreme Court "state action" cases,[5] the court of appeals found that "only those undertakings that are uniquely sovereign in character qualify as traditional and exclusive state functions." 43 F.3d at 907. While many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State." *Id*; quoting *Flagg Bros.*, 436 U.S. at 158. Accordingly, the court of appeals held that the organization, management and promotion of events such as festivals "do not fall within the domain of functions exercised traditionally and exclusively by the government. The government has not traditionally been the sole provider of community entertainment. Nor has it traditionally been the exclusive organizer of festivals, parades or fairs." 43 F.3d at 907-908.[6]

The plaintiffs in the *Gaston Festivals* case argued that the festival organizer was a "state actor" because the City of Gastonia had ceded control of its town center to the organizer and by showing that the city provided essential services to support the festival such as police support, fire support, and the like. The

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[5] This Court has identified as functions "traditionally exclusively reserved to the State," activities such as the administration of elections, *Nixon v. Condon*, 286 U.S. 73 (1932); *Terry v. Adams*, 345 U.S. 461 (1953); the operation of a company town, *Marsh v. Alabama*, 326 U.S. 501 (1946); eminent domain, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974); and peremptory challenges in jury selection, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

[6] See also *Gay Veterans Association, Inc. v. American Legion*, 621 F.Supp. 1510, 1518 (S.D.N.Y. 1985), holding that the non-governmental organizer of a Veterans Day parade on public streets was not a "state actor" under 42 U.S.C. §1983 because Veterans Day parades are not exclusively governmental functions.

court of appeals held that the involvement by the city did not change the result. "The principle is that private organizations who wish to use public property to organize festivals, fairs, rallies, parades, or meetings, are not chilled from doing so by the possibility that they will be subject to liability as if they were agents of the government." 43 F.3d at 910.

The court looked at the practical effect of holding otherwise. "The consequences of finding state action in this case would be difficult to overstate." 43 F.3d at 911. The court rightly observed that if it were to hold that the incidental power to exclude others from public property during the course of a limited, permitted use transformed the permit holder into a state actor, softball teams on the National Mall in Washington, D.C. would be constitutionally obliged to afford due process to those not allowed to play on the particular field at the same time, every family that barbecues at a public park would theoretically be barred from excluding uninvited guests on constitutionally suspect grounds, local churches could no longer use public facilities to hold events for fear of violating the Establishment Clause, and every picnic, wedding, company outing, meeting, rally, and fair held on public grounds would be subject to constitutional scrutiny merely because the organizer had been granted exclusive use of city facilities as well as authority to determine who may use those facilities and what they may say while on the public fora. 43 F.3d at 911. Because the festival organizer was found to not be subject to liability as a state actor under §1983 when it held its annual festival in the City of Gaston, the proper course was to dismiss the complaint against the festival organizer, because it was not acting "under color of law." *Id.*

The *Lansing* and *Gaston Festivals* cases illustrate an important point that was overlooked by the Eighth Circuit. Festivals are in a class by themselves when it comes to deciding whether a non-governmental organizer is a "state actor." For one thing, they are limited in time to a day or two. They do not "hog" a venue. Others are free to stage their own expressive activities on other days. A second distinguishing feature is that a large, public festival requires a considerable amount of prior planning and coordination with public entities.

Cases decided after *Lansing* and *Gaston Festivals* have noted these same distinctive features and the difference they make in the result.[7]

A commemorative air show at a city-owned airport requires a great deal of prior planning and coordination with public entities. Of course, the airport manager has to be involved in the plan. Yes, the city retains the right to suspend the air show and reopen the airport to other traffic if the need arises. Certainly, the police have to provide security considering the size of the crowd and the protection required for the

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[7] *Villegas v. City of Gilroy*, 363 F.Supp.2d 1207 (N.D. Cal. 2005), applied *Lansing* and the *Gaston Festivals* cases to shield the Gilroy Garlic Festival Committee from a § 1983 lawsuit by motorcycle club members who were expelled by the city police from the Gilroy Garlic Festival at the request of the Committee for refusing to remove their club vests. See *Diener v. Reed*, 232 F.Supp.2d 362, 383 (M.D. Penn. 2002), which applied *Lansing* and *Gaston Festivals* to a claim involving a one-day permit for an event in the park rather than a *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002), where there was a long-term lease of a public forum.

military aircraft furnished by the Department of Defense. Much more is required than merely asking people and airplanes to show up on a certain day in the hope that an air show might break out. But to say that close cooperation with the city under these circumstances constitutes "entwinement" for "state actor" purposes punishes Salute for its diligence.

While the Eighth Circuit decision stands, organizers of public events like Memorial Day air shows and other public festivals are faced with enormous financial risks if they continue to rely on public services and become "state actors" under § 1983, exposed to liability and back-breaking fee awards if they or their volunteers guess wrong as they try to maintain control over their message. Ostensibly, an organizer is supposed to be able to ensure that its message is not submerged by others, according to the Eighth Circuit. App. 19a. But how is this supposed to work? At the 2005 air show a protestor ignored Salute's right to have other messages suspended during the solemn ceremony at noon when the names of Boone County men killed in action were read. Trying to stop the protestor during this solemn time would have magnified the disruption, according to the officer in charge, so nothing was done. This would never have happened if the competing messages had been kept outside the gates, as in former years.

As a practical matter, the only way a festival organizer can enforce any rules is to be able to ask the police for assistance in removing persons who have lost their status as invitees after they have broken the rules upon which their invitation was conditioned. Unless something is done about the Eighth Circuit decision,

non-governmental organizers will lose control of their message and eventually the support of their volunteers and contributors, who will not want to feed the cowbird in the nest.

II. THE DECISION BELOW IS A RADICAL DEPARTURE FROM WELL-ESTABLISHED FIRST AMENDMENT PROTECTIONS AGAINST COMPELLED SPEECH, AND THE COURT SHOULD CLARIFY THE RIGHTS OF NON-GOVERNMENTAL ORGANIZERS OF PUBLIC EVENTS TO THEIR OWN MESSAGE AND FREEDOM FROM UNWANTED MESSAGES.

In the court below, Salute's rights were ultimately determined by the choice of an analogy, which in turn led to a choice of law. Is the Memorial Day air show more akin to a shopping mall or a festival parade? The Eighth Circuit chose the shopping mall and applied *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), to hold that Salute does not have a First Amendment right to keep unwanted messages off the tarmac. App. 18a. The court refused to apply the festival parade case, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), and it added additional tests not found in that decision.

The first test that the Eighth Circuit added to *Hurley* was the requirement of disruption.

> "The presence of nondisruptive expressive conduct during the remainder

> of the air show was not shown to threaten to alter Salute's message." App. 17a.

Nowhere in *Hurley* did this Court say that alternate messages could be injected into the St. Patrick's Day Parade of South Boston if they were "nondisruptive." *Hurley* was all about protecting a speaker's "autonomy to choose his own message." 515 U.S. at 573. Disruption or lack of disruption from the unwanted messages has nothing to do with it. The Court noted that the plaintiffs in *Hurley* marched "uneventfully" the one year they were allowed to do so under a state-court order. 515 U.S. at 561. But the fact they were nondisruptive was of no help to them in the final analysis.

A second test added to *Hurley* by the Eighth Circuit was a dilution test.

> "There is no evidence that Salute's message was diluted by the presence of a small number of sign carriers and leafleters at the 2005 air show, which was attended by over 25,000 people." App. 17a.

There is no "dilution" exception in *Hurley*. If this Court had meant to add one it had ample evidence upon which to do so. The annual St. Patrick's Day Parade of South Boston includes as many as 20,000 marchers and draws up to 1 million watchers. 515 U.S. at 560-61. The plaintiffs were only one group – a few fish in a sea of many. Nevertheless, the Court ruled that the parade sponsor had a First Amendment right to keep them out of the parade.

How many antiwar leaflets does it take at a Memorial Day air show to turn people's attention away from honoring and remembering veterans to debating the political dimensions of the war? Disruption happens one leaflet and one person at a time. The transformation is immediate and substantial for each person affected. For each of them, the Memorial Day message that Salute and its many volunteers and sponsors work so hard and pay so much to create is submerged.

As this Court said in *Hurley*, one's right to choose one's content under the First Amendment "boils down to the choice of a speaker not to propound a particular point of view. . . ." 515 U.S. at 575. Salute does not want the air show to be a political forum. It does not want pro-war leafleting or anti-war leafleting or any other leafleting to promote messages that are not about honoring and remembering veterans. Over the years, it has consistently maintained neutrality by keeping all extraneous messages off the secured tarmac. It wants to keep it that way. Its interests in this regard are consistent with hundreds if not thousands of other sponsors of events on public property across the country. The court of appeals' decision diminishes their First Amendment rights under *Hurley*, and the Court should grant this petition in order to redress the diminution.

Hurley recognized that inclusion of unwanted messages in the St. Patrick's Day Parade would run the risk that the public would perceive such messages were "worthy of presentation and quite possibly of support as well." *Hurley*, 515 U.S. at 574. For the lower court to say in this case that there is no reasonable likelihood

that the public will conclude that the plaintiffs' message reflects the beliefs of Salute flies in the face of a contrary conclusion by this Court based on accepted standards of human perceptions. Activities on the secured tarmac at the air show are an integral part of the expressive message, conveyed through static displays and ceremonies. Under the *Hurley* decision, Salute should not be compelled to accept other messages at that same place and time.

> "Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, 515 U.S. at 573.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 340 U.S. 705, 714 (1977). Requiring an individual to present a viewpoint not its own is the equivalent of forbidding the speaker to say what it wishes to say. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The government cannot force a speaker to tailor its speech to an opponent's agenda or respond to an opponent's arguments when it prefers to be silent. See *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 10 (1986). The choice of a speaker not to propound a particular point of view is presumed to lie beyond the government's power to control, and "when dissemination of a view contrary to one's own is forced upon a speaker . . . the speaker's right to autonomy over the message is compromised." *Hurley v. Irish-*

American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 575-76 (1995).

What Respondents are attempting to do, and what the Eighth Circuit decision is allowing them to do, is force Salute to provide a forum on the secured tarmac during the air show for other messages, including anti-military and anti-war advocacy. Respondents and others similarly situated are not offering to contribute anything toward the event, so the effect of their request is to have Salute and its volunteers and contributors play host for speech with which they do not agree. The First Amendment does not permit their rights to be disregarded in this manner. They, too, have rights to free speech, which include the right to not be compelled to support speech with which they disagree.[8]

Hawkins v. City and County of Denver, 170 F.3d 1281 (10th Cir. 1999), shows how *Hurley* has been applied by another circuit. Plaintiffs were a group of union musicians who wanted to picket and distribute leaflets expressing their grievances against the Colorado Ballet in the "Galleria" area of the Denver Performing Arts Complex. There was evidence that Denver allowed leaseholders to promote their businesses within the Galleria through the use of signs. There was also evidence that Denver made brochures listing events at other venues it owned and distributed

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[8] Government compulsion over what Salute must include in the air show is a given. Under its annual lease with the city, Salute is required to allow on the secured tarmac such other expressive activities as this case determines. As the case currently stands, Salute is being compelled to host messages that it does not want to host.

a publication that promoted events at the complex available in the Galleria. Occasionally, Denver also leased promotional space within the Galleria. Plaintiffs argued that these activities converted the area into a public forum and that they should be allowed to leaflet and picket in the forum. The trial court disagreed. On appeal, the Tenth Circuit affirmed the dismissal of the complaint. After reviewing the applicable Supreme Court decisions, the court of appeals found that in a nonpublic forum "the government has much greater latitude to restrict protected speech. The law draws no distinction between content-neutral and content-based restrictions in a nonpublic forum." *Id.* at 1287. Just because the City of Denver allowed some speech in the Galleria did not create a designated public forum, in the opinion of the court. *Id.* at 1288. The ban against leafleting was held not to be discrimination based on viewpoint. Because the ban was on all leafleting, there was no unlawful viewpoint discrimination. *Id.* at 1288-1289. The court distinguished the leafleting allowed the Krishna sect in Justice O'Conner's concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) on the grounds that Justice O'Conner's analysis was based upon a finding that the airports at issue were huge complexes open to travelers and non-travelers alike containing a multitude of commercial establishments, like a shopping mall as well as an airport. Clearly, the secured tarmac at the Columbia Regional Airport, which does not include the airport terminal or any commercial establishments, is not equivalent to a shopping mall, either, when it comes to applying the First Amendment.

Memorial Day is a civic holiday with deep roots in American history and culture. Three years after the

Civil War ended, General John A. Logan, the head of an organization of Union veterans—the Grand Army of the Republic (GAR)—established May 30th as "Decoration Day," to honor and remember the soldiers "who died in defense of their country during the late rebellion, and whose bodies now lie in almost every city, village and hamlet churchyard in the land." *General Orders No. 11*, Headquarters of the Grand Army of the Republic, May 5, 1868. Although Gen. Logan urged the people to garland the graves with flowers, he made it clear that "in this observance no form of ceremony is prescribed," leaving it to local posts and comrades to "arrange such fitting services and testimonials of respect as circumstances may permit." Ibid.

The first Decoration Day in 1868 was at Arlington National Cemetery. Approximately 5,000 people attended. Various federal officials, including General and Mrs. Ulysses S. Grant, participated in the ceremonies. After speeches, children from the Soldiers' and Sailors' Orphan Home and members of the GAR made their way through the cemetery, strewing flowers on both Union and Confederate graves, reciting prayers and singing hymns. *Memorial DayBackground,(www1.va.gov/opa/speceven/memday/history. asp)*, U.S. Department of Veterans Affairs.

By the end of the 19th century, Memorial Day ceremonies were being held throughout the nation. After World War I, the purpose was extended to honor and remember those who died in the all the nation's wars. In 1971, Memorial Day was declared a national holiday by an act of Congress. 5 U.S.C. §6103. In December 2000 the observance was further enhanced by "The National Moment of Remembrance Act," P.L.

106-579, which created the White House Commission on the National Moment of Remembrance.

Beyond question, Memorial Day has a message, and a commemorative event like a Memorial Day air show should not have been likened to a commercial shopping mall for purposes of First Amendment analysis, as the Eighth Circuit did in this case. People do not gather at shopping malls to assemble for a common purpose. They go to shopping malls to satisfy individual desires for goods and services. As with the "state actor" analysis under Point I, the court of appeals fell into error when it failed to take into account the fundamental differences between festivals and permanent fora and what those differences mean when it comes to the application of First Amendment rights.[9]

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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[9]Salute has First Amendment rights, even if it is found to be a "state actor." See *Griffin v. Department of Veterans Affairs*, 274 F. 3d 818 (4th Cir. 2001)(recognizing the right of the VA to not to fly the Confederate flag over a national cemetery). Government entities make decisions every day about what expressive materials to include and what to exclude as they decide what to exhibit or not exhibit in a museum, what books to buy for a library, what art to exhibit in a park, etc. A "state actor" does not check its First Amendment rights at the door, and the Eighth Circuit should not have avoided this issue as if it does not make any difference. It does to Salute to Veterans, who has the right to decide what does or does not happen on the secured tarmac during the air show.

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August 6, 2007

(any footnotes trail end of each document)

No. 06-1922
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Bill Wickersham; Maureen Doyle,
Plaintiffs/Appellees,

v.

City of Columbia,
Defendant,

Memorial Day Weekend Salute
to Veterans Corporation,
Defendant/Appellant.

November 16, 2006, Submitted

March 22, 2007, Filed

COUNSEL: For Bill Wickersham, Maureen Doyle, Plaintiff-Appellees: James G. Felakos, New York, NY, Anthony Edward Rothert, ACLU OF EASTERN MISSOURI, St. Louis, MO, Marilyn S. Teitelbaum, SCHUCHAT & COOK, St. Louis, MO, Dan Viets, Columbia, MO.

For Memorial Day Weekend Salute to Veterans Corporation, Defendant-Appellant: Dale C. Doerhoff, COOK & VETTER, Jefferson City, MO.

JUDGES: Before MURPHY, ARNOLD, and BENTON, Circuit Judges.

OPINION BY: MURPHY

OPINION

MURPHY, Circuit Judge.

Bill Wickersham and Maureen Doyle brought this § 1983 action against the City of Columbia and a nonprofit corporation known as the Memorial Day Weekend Salute to Veterans Corporation (Salute), seeking an injunction that would permit them to engage in expressive activities at Salute's Memorial Day air show at the municipal airport. The district court[1] concluded that enforcement of the air show rules, which is carried out by city police on behalf of Salute, violated the First Amendment. It issued a permanent injunction against the city and Salute requiring them to permit certain expressive activities at the annual event. The city does not appeal but Salute does, arguing that it is not liable as a state actor for its speech restrictions and that the injunction violates its own First Amendment right to be free from compelled speech. We affirm.

I.

Since 1993 Salute has staged its annual Memorial Day Weekend Salute to Veterans Air Show at the Columbia Regional Airport. Although the airport is owned by the city, the city gives Salute control over the tarmac for the show. The two day event is free and open to the public, and tens of thousands of people attend each year. In addition to feats of aerial acrobatics performed by military planes, the event features static airplane displays, exhibits by military recruiters, and food on the airport's secured tarmac. During the noontime hour

each day there is a ceremony to honor fallen veterans at which the national anthem is played, the names of fallen Boone County service members are read aloud, and the air show's honored guests are introduced to the crowd. The stated purpose of the air show is "to honor and remember" service members, past and present.

A resolution passed by the Columbia city council authorizes the city manager to execute a contract with Salute for exclusive control of the airport during the event, subject to the city's right to retake control in the event of an emergency.[2] Salute does not pay for this use. During the remainder of the year the airport is controlled by the city, and the tarmac is not open to general public access. At the time the city began leasing the airport to Salute for its annual event, the Columbia city code provided that the city could "make no lease or contract with any person...that will impair the City's control of [the] airport and its facilities." That ordinance was repealed in 2005 after commencement of this litigation.

Salute is responsible for deciding on the content of the air show, including the schedule of events, the list of honored guests, and the exhibits that will be displayed. Salute pays for liability insurance, the sound system, and the fees and incidental costs associated with the use of the military air craft. City personnel are responsible for operating the airport during Salute's air show, and Salute's president Mary Posner conceded that airport manager Bill Boston, a city employee, is "absolutely essential" to the event's success. In the past few years, he has borne primary responsibility for developing the Ground Operations Plan for the air show and has coordinated with the Federal Aviation Administration

to facilitate the air show's compliance with federal regulations. Numerous city officials participate in briefings in preparation for the air show. While Salute receives a variety of services from the city at no charge, as authorized by the city council, it does not receive direct payment of public funds.

Salute must apply to the Department of Defense (DOD) to secure the involvement of the federal military aircraft that are displayed at the air show. On its application Salute attests each year that the event is "officially supported by local government," one of the requirements for access to the planes. It also states that the event will be open to the public, another DOD condition for use of its planes. City Manager Raymond Beck signs the application forms on behalf of the city. In 2005 the city listed the air show on its website under sections entitled "Guide to City Services" and "Public Works Provided for Residents and Businesses." Salute includes a disclaimer in its media releases, stating that the air show is presented solely by Salute and should not be referred to as the Columbia Air Show or "any other designation that would imply it is hosted, organized, or in any way sponsored by the City of Columbia." The city's contract with Salute also states: "In no event shall the City and the Corporation be deemed or construed to be joint venturers or partners."

Salute imposes a number of restrictions on behavior at the air show, including limits on expressive activities. Although the list of prohibited conduct differs slightly from time to time in its precise wording, it has included prohibitions against soliciting, petitioning, leafleting, political campaigning, and "unauthorized" signs. These rules are widely publicized and often appear on Salute's

media releases about the air show. Salute's restrictions apply within the fenced tarmac area which is accessed through several gates.

Columbia police officers provide security at the air show, and it is coordinated by Captain Michael Martin. Salute provides no reimbursement to the city for the officers' time. Captain Martin has developed a security plan for the event each year which incorporates Salute's restrictions on expressive activity. Posner testified in her deposition that she had no personal role in developing the security plan, but that Salute gave directions to the police department about which activities were to be prohibited. The 2003 version of Martin's security plan stated that "no protests are permitted inside the tarmac fence."[3] An interoffice memorandum was also circulated in 2004 to instruct police officers about their role in enforcing Salute's speech restrictions. It included the following:

Protesters are likely at the show. . . .Should protesters attempt to enter the premises, officers will immediately advise the Command Center and will stop their forward progress. Officers will advise them of the area being private property and of the restrictions related to carrying signs, seeking signatures to petitions, or demonstrating. Any person who persists in entering will be given a trespass warning prior to arrest. Keep in mind that persons are not restricted from entering, only those who intend to conduct a protest once entry is made.Police officers are instructed to have their police identification badges visible at all times during the event.

Captain Martin stated in his deposition that the air

show was the only event for which he could recall being asked to enforce a private organization's speech restrictions. He stated that Salute's president Mary Posner was the final arbiter of what constituted unwanted protest at the event. He testified further that if she were ever to ask him to remove someone on account of that person's race, he would readily comply.

In 2004 appellee Maureen Doyle attempted to distribute antiwar fliers inside the secured tarmac. A Columbia police officer confronted her and stated that she would be arrested if she continued to hand out leaflets. Soon more officers arrived, and one grabbed leaflets out of her hands. Doyle then left the air show. At that same air show, appellee Bill Wickersham attempted to collect signatures inside the fenced tarmac area on an initiative advocating renewable energy. He was approached by a police officer and advised to cease petitioning. When he refused, the police officer took him to the department's command post at the air show and issued him a trespass warning. After Posner directed that he be arrested for first degree trespassing, the police arrested him at the show but he was never prosecuted.

Wickersham and Doyle brought this action against Salute and the City of Columbia under 42 U.S.C. § 1983, seeking injunctive relief permitting them to distribute leaflets, circulate petitions, and engage in other expressive activities at future air shows. They alleged violations of their First Amendment rights to free expression, characterizing the air show as a public forum. They argued that although Salute was a private corporation, it was a state actor in its imposition of restrictions on free speech given the degree of joint

participation between Salute and the city in staging the air show and enforcing the restrictions. They also claimed that by granting Salute complete discretion to determine who was arrested at the air show, the city had ceded a public function to Salute.

During discovery plaintiffs produced evidence about the joint activity of Salute and the city in staging the air show. Among the depositions they took were those of Mary Posner of Salute and Captain Martin. Captain Martin testified that the police department was responsible for enforcing Salute's speech restrictions as part of the city's agreement to lease Salute the property, and Posner testified that the police discharged this enforcement responsibility "on [Salute's] behalf."

On May 18, 2005 the district court granted a temporary injunction permitting plaintiffs to distribute leaflets and wear expressive clothing at the 2005 air show, but not allowing them to circulate petitions or engage in other forms of solicitation. It found that Salute was a state actor because of the degree to which the city and Salute were intertwined in the staging of the air show. The court also found that the city had delegated a public function to Salute by giving Posner control over the police during the air show. Subsequent to the court's order and prior to the 2005 air show, Salute wrote to the police department disavowing any delegation of police authority and stating that Salute "will play no role in the exercise of authority and discretion by the City Police . . . ."

At the 2005 air show, leafleting and expressive clothing were permitted as required by the temporary

injunction; sign carrying was also allowed even though it had not been specifically addressed in the order. At a subsequent deposition, Captain Martin testified that no one had tried to circulate petitions at the 2005 event but that he would have stopped anyone who did, not because such activity violated a city ordinance, but because Salute disapproved it and it was not protected by the temporary injunction. A handful of individuals were present inside the secured tarmac at the 2005 event to hand out leaflets or carry signs. Martin observed no disturbances caused by their presence at the air show. Several members of the public did submit written complaints to Salute about the presence of "protestors" on the tarmac. One individual handed out commercial leaflets advertising a nearby restaurant, and Posner later testified that she was concerned that there would be more commercial leafleting at future shows.

On March 3, 2006, after additional depositions and hearings had occurred and evidence about the 2005 air show had been produced, the district court issued a permanent injunction. The injunction incorporated its earlier May 18, 2005 order by reference. As a predicate to its First Amendment analysis, the district court once again found Salute to be a state actor when it enforced its speech restrictions against plaintiffs, because it was entangled with the city in planning the air show and monitoring unwanted expressive activities. It also held the city accountable for the direct role of the police in enforcing the speech restrictions.

The court concluded that the air show was a non public forum in which Salute as a state actor could impose reasonable and neutral regulations without offending

the First Amendment, but that a blanket prohibition on leafleting and sign carrying was neither reasonable nor viewpoint neutral. It found that Salute's prohibition on petitioning was permissible, however, because it was both reasonable and uniformly enforced. The district court ordered Salute and the city to permit leafleting, sign carrying, and the wearing of expressive clothing at future air shows subject to reasonable restrictions on time, place, and manner. The court also gave special consideration to Salute's noontime ceremony at the show, ordering that Salute could restrict expressive activities at that daily event and the city could lawfully remove individuals who did not respect those restrictions. The court rejected Salute's argument that it had a First Amendment right to exclude all unwanted forms of expression at its air show, questioning whether a state actor like Salute had First Amendment rights. Even if it did, the court reasoned, the presence of other messages on the tarmac would not interfere with such rights.

Salute appeals from the final judgment, contesting the district court's conclusion that it was a state actor and arguing that the injunction violates its own First Amendment rights by forcing it to provide a forum for messages it does not support. Although the City of Columbia is also subject to the court's injunction, it has not appealed.

II.

Generally a district court's conclusions of law are reviewed de novo and its findings of fact, for clear error. See *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 621 (8th Cir. 2002) (en banc). Where the

First Amendment is implicated, however, we make an "independent examination of the whole record" in assessing the factual predicates of the free speech claim. Id. (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). We nevertheless continue to apply a clear error standard to facts not directly related to the First Amendment issue, see *Doe*, 306 F.3d at 621, including the factual predicates to the state action inquiry. See *Howerton v. Gabica*, 708 F.2d 380, 384 (9th Cir. 1983).

The first Amendment guarantee of free speech guards against abridgment through state action alone. It does not inhibit private restrictions on speech. *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976). In certain circumstances the government may become so entangled in private conduct that "the deed of an ostensibly private organization or individual is to be treated . . . as if a State had caused it to be performed." *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001).

To ascertain whether there is state action in a case, we examine the record to determine "whether the conduct at issue is 'fairly attributable' to the state." *Montano v. Hedgepeth*, 120 F.3d 844, 848-849 (8th Cir. 1997) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)). We are guided in this inquiry by two additional queries: whether the claimed deprivation "resulted from the exercise of a right or privilege having its source in state authority" and whether the party engaging in the deprivation "may be appropriately characterized as [a] state actor[]." See *Lugar*, 457 U.S. at 939 (internal

quotations omitted). Since Salute's authority to impose speech restrictions at its air show derives from the city's grant to it of temporary control over the airport, Lugar's first prerequisite for state action is met. See *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902, 906 n.1 (4th Cir. 1995) (grant of permit to hold festival satisfies first Lugar inquiry). The key issue is whether Salute may appropriately be considered a state actor in the circumstances presented. If a party's conduct meets the requirements for state action, the same acts also qualify as actions taken "under color of state law" for purposes of § 1983. *Lugar*, 457 U.S. at 935.

The Supreme Court has recognized a number of circumstances in which a private party may be characterized as a state actor, such as where the state has delegated to a private party a power "traditionally exclusively reserved to the State," see *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974), where a private actor is a "willful participant in joint activity with the State or its agents," see *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 151, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), and where there is "pervasive entwinement" between the private entity and the state, see *Brentwood*, 531 U.S. at 291. These particular circumstances are merely examples and not intended to be exclusive. See id. at 295.

Our ultimate conclusion must turn on the particular facts of the case, since "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). The one unyielding requirement is that

there be a "close nexus" not merely between the state and the private party, but between the state and the alleged deprivation itself. See *Brentwood*, 531 U.S. at 295. No such nexus exists where a private party acts with the mere approval or acquiescence of the state, see *Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982), but a private entity may be considered a state actor if it "has acted together with or has obtained significant aid from state officials" in furtherance of the challenged action. Lugar, 457 U.S. at 937.

Salute argues that this case is governed by our decision in *Reinhart v. City of Brookings*, 84 F.3d 1071 (8th Cir. 1996). In Reinhart, we held that the actions of a private organization in restricting political campaigning at its arts festival could not be attributed to the city, even though the festival took place in a public park. The fact that a city allows a private entity to hold a major event on its property is not sufficient to convert the private conduct of event organizers into state action even where the organizers impose their own rules on expressive conduct, for the state's "mere acquiescence" in an alleged deprivation is not enough. *Id.* at 1073. The degree of entanglement between the City of Columbia and Salute goes well beyond the relationship in Reinhart. There, the city had no role in planning, advertising, or managing the festival, and the organizers were solely responsible for enforcing the restrictions on expressive activity. *Id.* at 1072-73.

Here, the city's role was far more than "mere acquiescence," for the city not only provided critical assistance in planning and operating the show, but also played an active role in enforcing the particular speech

restrictions challenged in this action. City police, not Salute volunteers, enforce the restrictions every year, a role that Captain Martin characterized as part of "the agreement that's in place" with Salute. The active and prearranged role of the police in effectuating the event's private speech policies also sets this case apart from *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000), another case relied on by Salute. In Lansing, the court specifically noted that the City of Memphis had made no attempt to instruct its officers on how to police unwanted speech activities on festival grounds. *Id.* at 833-34.

The direct role of the Columbia police in enforcing Salute's speech restrictions provided the critical nexus, absent in other cases, between the challenged conduct and the exercise of state authority.[4] See, e.g., *Gaston*, 43 F.3d at 909 n.4 (appellant conceded absence of nexus); see also *D'Amario v. Providence Civic Ctr. Auth.*, 783 F.2d 1, 3 (1st Cir. 1986) (city officials' enforcement of private speech restriction provides requisite nexus between alleged deprivation and state involvement).

Salute contends that its contract with the city transformed the airport into its own temporary private property,[5] over which it had the right to decide who was welcome and who was not and thereafter to seek police assistance in ejecting trespassers. To be sure, the mere invocation of state legal procedures, including police assistance, does not convert a private party into a state actor. See *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001) (invoking state assistance to apprehend shoplifter).

The contributions of the Columbia police go beyond the kind of neutral assistance that would normally be offered to private citizens in enforcing the law of trespass. In Griffin v. Maryland, the Supreme Court distinguished between a deputy sheriff's enforcement of trespass law and his active enforcement of a private park's segregation policy, holding that the latter situation amounted to state action. 378 U.S. 130, 136-37, 84 S. Ct. 1770, 12 L. Ed. 2d 754 (1964). Here, the police department's security plan instructed the officers to enforce Salute's rules rather city ordinances, and police took an active role in identifying and intercepting protesters at the air show, including Wickersham and Doyle. The city's cooperation with Salute was directed toward effectuating the challenged policy rather than merely keeping the peace. See *Howerton v. Gabica*, 708 F.2d 380, 385 (9th Cir. 1983) (active and repeated police involvement amounts to state action even though response to citizen's complaint does not).

When a private entity has acted jointly and intentionally with the police pursuant to a "customary plan," it is proper to hold that entity accountable for the actions which it helped bring about. See *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558-559 (8th Cir. 1989); see also *Dossett v. First State Bank*, 399 F.3d 940, 950 (8th Cir. 2005) (applying joint action test for state action to § 1983 action alleging First Amendment violation). In making its findings the district court specifically rejected the suggestion that Salute had asked for nothing more from the city than the use of its property. The record supports the trial court's findings, for it contains evidence of a mutual understanding that city police would work to restrict speech activities at the air show according to Salute's wishes.

Although certain changes occurred between the entry of the temporary and permanent injunctions, including Posner's statement to the police disclaiming authority to direct their actions at the air show, the overall "momentum" of the cooperation remained unaltered. See *Brentwood*, 531 U.S. at 301 (quoting *Evans v. Newton*, 382 U.S. 296, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966)). In its order granting the permanent injunction the district court again found that Salute and the city had acted "like partners" with respect to the 2005 air show and that their mutual understanding about the city's role in enforcing the speech restrictions continued as before.[6] In light of the evidence showing a continuing history of cooperation and Captain Martin's admission that he would have enforced Salute's rules at the 2005 air show even where city ordinances had not been violated, we cannot characterize these findings as clearly erroneous. Even if the police no longer received directions from Salute at the air show or consulted Salute members about whom to arrest, they nevertheless continued to respond to the broader directives of Salute by enforcing its speech restrictions as part of their security duties. Cf. *Brentwood*, 531 U.S. at 301 n.4 ("underlying reality" of private entity's relationship to the state often trumps legal formalities erected in attempt to thwart a finding of state action).

Since Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions, we conclude that Salute was a state actor when it interfered with appellees' expressive activities. The district court did therefore not err in holding that Salute's curtailment of appellees' freedom of expression constituted state action and was actionable under § 1983.

Salute next argues that the district court's order requiring it to permit leafleting, sign carrying, and expressive clothing at the air show interferes with its own First Amendment right to control the expressive content of its event, relying on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). In Hurley, a state court had ordered a private association to include a group of gays, lesbians, and bisexuals as a marching unit in its St. Patrick's Day Parade in compliance with a state public accommodation law prohibiting discrimination on the basis of sexual orientation. *Id.* at 562-63. The Supreme Court reversed, holding that application of the state law violated the parade organizer's First Amendment rights since the state cannot compel a private entity to disseminate particular views or to alter its message to suit the government. *Id.* at 573. Salute cites Hurley as authority for its argument that the order compelling it to permit other messages at its air show violates its First Amendment rights.

Appellees respond that as a state actor Salute cannot assert rights under the First Amendment, echoing the district court's suggestion that state actors do not enjoy the same constitutional rights guaranteed to private entities like the parade organizer in Hurley. Neither appellees nor the district court cited authority for this proposition. Appellees also argue that even if Salute had the full panoply of First Amendment rights, the district court's injunction would not violate those rights because Salute is not being compelled to affirm any message with which it disagrees; rather it is being required to tolerate the presence of other messages from which it may easily dissociate itself.

Unlike Salute the parade organizer in Hurley was not a state actor, see *id.* at 566, and there was no question that the organizer maintained its full rights under the First Amendment. The Supreme Court concluded that those rights were violated by the presence of unwanted marching units because they would have altered the organizer's message which was communicated by the composition of the parade. *Id.* at 576. In contrast Salute has not shown that its message was dependent upon the composition of the crowd at the air show. The competing expressive interests were also considered in Hurley. The Court pointed out that the gay, lesbian, and bisexual group could put on a parade of its own to promote its message, see *id.* at 578, but appellees here could not likely organize an event similar to the air show in order to advance their views or secure the kind of privileged access to city property that Salute enjoys.

Whether a private entity like Salute forfeits some of its right to deliver its own message unimpeded by others when it assumes the role of state actor need not be decided on this record because Salute has not shown that the injunction infringed its own ability to deliver its chosen message. The district court's injunction protects Salute's daily noontime ceremony in honor and remembrance of veterans from any competing expressive activities, giving Salute complete control over the message that it wants to communicate during this special event. The presence of nondisruptive expressive conduct during the remainder of the air show was not shown to threaten to alter Salute's message. There is no evidence that Salute's message was diluted by the presence of a small number of sign carriers and leafleters at the 2005 air show, which was attended by over 25,000 people. Appellees sought only

to express their own views as spectators at the air show, and their signs and leaflets were "not likely [to] be identified" with Salute. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980); see also *Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005). The fact that after the 2005 air show some individuals complained to Salute about the presence of "protesters" at the event speaks to the public's ability to distinguish between Salute's message and any others permitted by the court's injunction. See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 1310, 164 L. Ed. 2d 156 (2006).

Unlike the situation in Hurley, where the sponsor had been unconstitutionally required to include in its parade a particular message favored by the state, namely support for the rights of gays, lesbians, and bisexuals, see 515 U.S. at 579, here there is "no specific message . . . dictated by the State to be displayed," mitigating concerns that the government is coercing affirmance of a particular favored viewpoint. See *Pruneyard*, 447 U.S. at 87. If the City of Columbia has shown any preference for a particular message, it has been for Salute's. The present situation involving a large air show, free and open to the public, has more relevant similarities to Pruneyard, where the Supreme Court held that a mall owner's First Amendment rights were not violated by a state constitutional requirement that he allow petitioning on his property. *Id.* at 88.

On this record we cannot say that the presence of leafleters and sign carriers interfered with any First Amendment rights Salute might have in the circumstances where its involvement is that of a state

actor. In deciding that Salute could not constitutionally prohibit *all* sign carrying and leafleting at its air show, the district court did not hold that Salute could impose *no* restrictions on those activities. Salute remains free to impose reasonable and viewpoint neutral rules related to time, place, and manner. The reasonableness of any restrictions are "assessed in light of the purpose of the forum and all the surrounding circumstances." *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 687, 112 S. Ct. 2711, 120 L. Ed. 2d 541 (1992) (O'Connor, J., concurring) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)). Salute remains free to take reasonable steps to ensure that its air show message would not be submerged by any alternate forms of speech which prove to be unduly intrusive in their timing, place, or manner of expression.

III.

In sum, the speech restrictions imposed at the annual air show involved state action on the part of Salute because it was consistently entangled with the city in effectuating them, and the district court did not err or abuse its discretion in fashioning the permanent injunction requiring Salute and the city to permit certain expressive activities at this public event. There has been no showing that Salute's constitutional rights were violated by the injunction, and Salute is free to return to the district court if changed circumstances were to warrant modification of the injunction or any other action. Accordingly, we affirm the judgment of the district court.

Footnotes

1The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

2The city's resolution and its contract with Salute have remained substantially the same for the past several years.

3Captain Martin stated in his deposition that the plan had been approximately the same from year to year until the 2005 air show, during which Salute and the city were required by the preliminary injunction to permit leafleting.

4Municipalities are state actors for the purpose of § 1983 claims. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

5The city's own ordinance prohibited it from ceding control of the airport to Salute or any other party until 2005 when the relevant ordinance was repealed.

6The district court specifically found that "the City knows, when it enters into the temporary lease of the tarmac, that the Corporation will exclude all unauthorized speech and will seek the assistance of the City to enforce those rules."

Case No. 05-4061-CV-C-NKL
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
CENTRAL DIVISION

BILL WICKERSHAM and MAUREEN DOYLE,
Plaintiffs,

v.

CITY OF COLUMBIA, MISSOURI and MEMORIAL DAY WEEKEND SALUTE TO VETERANS CORP.,
Defendants.

March 31, 2006, Decided

COUNSEL: For Bill Wickersham, Maureen Doyle, Plaintiffs: Dan Viets, Dan Viets Law Office, Columbia, Mo; James G. Felakos, American Civil Liberties Union of Eastern Missouri, St. Louis, MO; Marilyn S. Teitelbaum, Schuchat, Cook & Werner, St. Louis, MO.

For Columbia, City of, Defendant: Robert J. Krehbiel, King,Krehbiel,Hellmich,Hentz & Borbonus, St. Louis, MO.

For Salute to Veterans Corp., Defendant: Dale C. Doerhoff, Cook, Vetter, Doerhoff & Landwehr, P.C., Jefferson City, MO.

JUDGES: NANETTE K. LAUGHREY, United States District Judge.

OPINION BY: NANETTE K. LAUGHREY

OPINION

ORDER GRANTING PERMANENT INJUNCTION[1]

I. Background

On May 18, 2005, the Court entered a preliminary injunction which permitted Plaintiffs to distribute leaflets at the May 2005 Memorial Day Air Show ("Air Show") and to wear expressive clothing, hats and buttons. The Court denied Plaintiffs' request to circulate petitions or engage in any other form of solicitation. Subsequent to the 2005 Air Show, the parties supplemented the factual record and provided additional briefing and oral argument. The Court must now determine whether a permanent injunction should issue, taking into account the factual record presented at both the preliminary and permanent injunction hearings.

II. Supplemental Facts [2]

A. Change in City Ordinance

On May 16, 2005, the Columbia City Council ("City") repealed Ordinance § 3-3, Ord. No. 10665 (1985), which stated: "The city shall, at all times, maintain full control of the airport. The city shall adopt no ordinance, resolution or motion and shall make no lease or contract with any person, including the United States Government, which will impair the City's control of such airport and its facilities, nor shall it enter into any agreement which may be contrary to the Federal Aviation Act." It appears that the City was not aware of this ordinance when it gave exclusive control of the

airport tarmac to the Salute to Veterans Corporation ("Corporation") in 2000, 2001, 2002, 2003 and 2004. When it became aware of the ordinance, the City Counsel repealed it so that the City could legally contract with the Corporation for the 2005 Air Show.

B. Change in Law Enforcement Protocol

Subsequent to the Court's May 18, 2005, Order, Mary McCleary Posner ("Posner"), the president of the Corporation, wrote a letter to Columbia's City Counselor notifying the City that the Corporation "will play no role in the exercise of authority and discretion by the City Police and the supporting law enforcement officers from other agencies during the 2005 Air Show or at any other time or place. The City Police and supporting law enforcement officers will be acting on their own initiative and discretion in the enforcement of city ordinances and the laws of Missouri during the 2005 Air Show as they do at other times and places. Without limitation, this includes enforcement of laws against trespassing and offenses against public order." Def. Ex. 8. Thus, it now appears that the City Police will exercise independent judgment before removing Plaintiffs and similarly situated people from the airport tarmac. Def. Ex. 15 (Martin Dep.) at 10-14.

C. 2005 Air Show

The 2005 Air Show occurred on May 29 and 30, 2005. The Corporation and the City complied with the Court's Preliminary Injunction Order which permitted leafleting and expressive clothing. While the Court's Order did not address the issue of signs, the Corporation and the City permitted signs to be carried during the Air Show. Plaintiffs have now requested the

Court for a declaration that signs may be displayed at future Air Shows.

Approximately 25,000 to 27,000 people attended the 2005 Air Show. During the two-day program, there were ceremonies and speeches honoring veterans and current troops, aerobatic and static displays of aircrafts; a static antique automobile show; vendors selling souvenirs and books related to the military and war; armed forces recruiters and military exhibits, such as an Army climbing wall, Army NASCAR, Army adventure van, Army shooting gallery, Navy Taj Mahal, Air Force Raptor and van, Marine Corps obstacle course, 128th Field Artillery Howitzer Battery and multiple national guard vehicles and pieces of equipment.

The 2005 Air Show also included a toy police car with robot driver; a swearing in ceremony for new recruits; advertisements honoring the military and veterans or simply advertising various private companies; and a radio station with a van broadcasting from the tarmac. Def. Ex. 188; Def. Ex. 15 (Martin Dep.) at 79:3-15, 94:1-95:2; Pl. Ex. 50; and Pl. Ex. 52.

Captain Martin testified that the pictures in Plaintiffs' Exhibit 50 accurately reflect the overall atmosphere of the Air Show. It is fair like and generally open except along the orange fence which is closest to the air display or where lines have formed for food or other activities.[3] Crowding also occurred when attendees were talking to, taking pictures with and obtaining autographs from parachutists on their souvenir program.

On both days of the Air Show, a group calling itself "Operation Simply Shred" approached attendees and

asked if they wanted any leaflets shredded. There were at least two separate people with shredders on the tarmac during the Air Show. Def. Ex. 15 (Martin Dep.) at 19-22. *Also see* Def. Ex. 193 (Preckshot Dep.) at 29 (Preckshot admitted that shredders occasionally were on the tarmac), and Def. Ex. 189 (Sanders Dep.) at 6-7 (Sanders observed the shredders on the tarmac).

The people with shredders carried a recycling bag and would take any paper from the public, shred it and then use it as cat litter. Operation Simply Shred was organized in response to those persons at the Air Show who were distributing leaflets. *See* Def. Ex. 193 (Preckshot Dep.) at 6-9. "After a while, it gets to be too much. If they want their freedom of speech, then we have our freedom of speech." Def. Ex. 193 (Preckshot Dep.) at 22. On occasion, the public was permitted to put their leaflets in the shredder themselves. Def. Ex. 193 (Preckshot Dep.) at 26-27.

A television reporter interviewed Captain Martin and Plaintiff Bill Wickersham ("Wickersham") on the secured tarmac at the 2005 Air Show, and people had their lawn chairs on the tarmac. Pl. Ex. 52; Def. Ex. 15 (Martin Dep.) at 95-96:16,

C. Complaints at 2005 Air Show

None of these many and diverse events disrupted the 2005 Air Show. Operation Simply Shred did not create any disruption, Def. Ex. 15 (Martin Dep.) at 60:11-19, and no one complained about them. However, David Williamson, a firefighter, was upset when someone passed out leaflets during the national anthem. Def. Ex. 192 (Williamson Dep.) at 5:18-22. Also, Dr. Annette Sanders ("Sanders") testified that because

someone handed her a leaflet she lost sight of the television crew that she was following, and, therefore, had a shorter interview with them once she found the reporters. Def. Ex. 189 (Sanders Dep.) at 20-23. There was also a person carrying an anti-war sign who walked in the area adjacent to the grandstand during the noontime program to honor veterans. Def. Ex. 15 (Martin Dep.) at 80-83.

In 2005, for the first time, the Corporation set up a tent that had a banner labeled "Comment Cards." Def. Ex. 189 (Sanders Dep.) at 11. They collected 54 comment cards and nine of those cards directly or indirectly contained complaints about the presence of anti-war protestors at the Air Show. Def. Ex. 189 (Sanders Dep.) at 12-16, 24-25, 33-34. The nine critical comment cards read as follows:

> . "I enjoyed the Airshow, but was greatly disappointed in seeing the 'Un-American' protestors disgracefully passing out propaganda. I believe something needs to be done to them which limits their 'Un-American' tactics for the future air shows. It seems as if they don't understand who protects their freedoms.
>
> . "No protestors in tarmac."
>
> . The third one said that he was stopped fifty yards in the gate by someone with a copy of the *Bill of Rights*. "Almost ran into me, here for the heritage & sights, not politics."
>
> . "I have one complaint. The guy with the sign (protesting) was the only one walking

around during the National Anthem in front of grand central. These guys with protesting signs are the ones showing lack of respect to our country & to our veterans. Why are they in here?"

. "The protestors should not be allowed to walk around on the air field carrying their signs. The men & women in uniform do not need to see this. It's the day to commemorate the military not protest them."

. "Get rid of protestors inside tarmac."

. "If at all possible keep demonstrators out!"

. "Please restrict the conscientious objectors & other unpatriotic demonstrators to designated areas where they do not desecrate the memories of our veterans."

Additionally, Posner objected to the leaflets which were distributed by a little restaurant located in the airport terminal because people might go to the restaurant and drink and then return to the Air Show. Def. Ex. 190 (Posner Dep.) at 9:15-11:3. However, people could also go to their cars and drink and then return to the Air Show.

Posner testified that she had to move the Tuskegee airmen between the bagpipe players and the honored guests to ensure their protection because she feared the airmen might be confronted by members of the Ku Klux Klan. Def. Ex. 190 (Posner Dep.) at 16:5-17:15. She

did not present any evidence that the Ku Klux Klan would attend the Air Show, much less disrupt it.

D. Air Show Attendance

Posner and Sanders testified that attendance at the 2005 Air Show was down and they contend that the drop in attendance was because of publicity surrounding this lawsuit. However, there is no objective evidence in the record to show that any decline in attendance was related to the Plaintiffs' *First Amendment* activities. Posner and Sanders did not identify a specific year with a comparable program that had a higher attendance. Nor does the record contain news articles or media coverage of the lawsuit.

III. Standard of Review - Permanent Injunction

The *Dataphase* factors applicable to a request for preliminary injunction are also used to evaluate a request for a permanent injunction, except the focus is on whether the Plaintiff has established the merits of the claim. *See Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 112-114 (8th Cir. 1981)*(en banc); *Bank One, Utah v. Guttau, 190 F.3d 844, 847 (8th Cir. 1999).*

IV. State Action [4]

A. City

The City is a state actor because it is a creature of the state. Nonetheless, the City argues that it has not violated the Plaintiffs' *First Amendment* rights by excluding them from Air Shows because City Police have only enforced rules established by a private

entity. Thus, any injury sustained by the Plaintiffs was caused by the Corporation, not the actions of the City.

As the Court has previously held, the Defendants cannot assume all the benefits of a partnership but accept none of the burdens. The City and the Corporation act like partners; are perceived to be partners and are mutually benefitted by their relationship. The City cannot avoid responsibility for its actions by simply giving control of the tarmac to the Corporation, especially while the City retains an easement to re-enter, and actively assists the Corporation by operating the airport during the Air Show. Because of the special relationship between the City and the Corporation, this case is not governed by *Reinhart v. City of Brookings, 84 F.3d 1071 (8th Cir. 1996)*. In addition, because the Columbia Police will now be exercising discretion if they remove Plaintiffs or similarly situated persons from the tarmac, the City cannot claim that it is merely following the directive of a private party.

B. Corporation

Because the Corporation has disavowed any special control that it once had over the Columbia Police at the Air Show, it urges the Court to reconsider its finding that the Corporation is a state actor. The Court is not persuaded. While the Corporation no longer directs the Police, it still receives substantial governmental assistance for the Air Show. It is also so entangled with the local, state and federal governments that there is an appearance that the Corporation is acting in concert with them.

While the Corporation claims to have never asked for anything other than the use of the tarmac for the Air Show, Def. Ex. 190 (Posner Dep.) at 23:2-7, [5] the record clearly demonstrates that the Air Show could not occur without the simultaneous involvement of every governmental entity in the area. The federal government sends military personnel and multi-million dollar airplanes and equipment. The local governments provide everything from the land for the event to special on-site trash, police, fire and ambulance services. Of primary importance is the fact that the Corporation is putting on an Air Show which cannot occur without the operation of the City's airport. Nor can the Corporation get FAA approval for the Air Show without submitting a ground operation plan which is prepared by the City. In addition, the military will not send its aircraft unless the City attests that it is making the airport available and the event is officially supported by the City.

If the Corporation is not a state actor given these facts, then the state action doctrine can be rendered meaningless by the simple expedient of shifting temporary control of public property to a private corporation while the governmental entity continues to provide essential support for the event. A wink and a nod should not be enough, particularly when the City knows, when it enters into the temporary lease of the tarmac, that the Corporation will exclude all unauthorized speech and will seek the assistance of the City to enforce those rules.

IV. *Hurley*

The Corporation and the City continue to argue that the *First Amendment* rights of the Corporation will be

violated if the Plaintiffs are permitted to distribute leaflets or carry signs at future Air Shows. They rely primarily on the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).* [6] It is now clear that *Hurley* is inapplicable and the Corporation's *First Amendment* rights are not violated by the Plaintiffs' expressive activity at the Air Show.

In *Hurley,* the United Supreme Court held that a private group has a right to express a certain viewpoint, and as a corollary to that right, can exclude people from its organization. [7] For this reason, the state of Massachusetts could not require the private organizers of a St. Patrick's Day parade to include in their parade the Irish-American Gay, Lesbian and Bisexual Group of Boston, because the inclusion of that group would interfere with the message being conveyed by the parade, which is itself a form of expression. Similar logic led the Supreme Court in *BSA v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000),* to find in favor of the Boy Scouts who wanted to exclude homosexuals from its organization. According to the Boy Scouts, they had a long history of opposing homosexuality, so requiring them to admit a homosexual Scout leader would interfere with their expressive association.

The Plaintiffs, however, are not trying to participate in the Air Show or become members of the Corporation. They are not even asking to operate a booth. They only want to come into the public area of the event and pass out leaflets, petition, carry signs and wear expressive clothing. Neither *Dale* or *Hurley* are applicable. See *Gathright v. City of Portland, Oregon, 439 F.3d 573 (9th Cir. Feb. 24, 2006); Parks v. City of Columbus, 395 F.3d*

643 (6th Cir. 2005); *Mahoney v. Babbitt, 323 U.S. App. D.C. 120, 105 F.3d 1452, 1456 (D.C. Cir. 1997)* (parade organizers could not exclude people watching the parade merely because they carried protest signs).

Further clarification on these issues has been given recently by the United States Supreme Court in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006).* The Forum for Academic and Institutional Rights ("FAIR") is an association of law schools and law faculties with policies against gender orientation discrimination. Because the United States military discriminates against homosexuals, members of the Association have not permitted military recruiters to interview their law students at recruitment events sponsored by the law schools. In response, the United States Congress passed the *Solomon Amendment*, which requires all universities which receive federal funds to give military recruiters the same access to their students that other employers receive.

FAIR sought a preliminary injunction of the *Solomon Amendment*, claiming that it violated the *First Amendment* freedoms of speech and association of its members. By giving military recruiters equal access, the *Solomon Amendment* forced the schools to be associated with the discriminatory policies of the military and compelled them to speak a message with which they disagreed.

The Supreme Court rejected FAIR's speech claim primarily because recruitment is not speech or even symbolic speech, it is merely conduct. It also rejected the law schools' argument that the *Solomon*

Amendment required the law schools to accommodate speech with which they disagreed.

The Supreme Court distinguished *Hurley*, saying that a parade is a form of expression and the organizer's message would be affected if it was forced to include someone else's message. In contrast, requiring the law schools to accommodate the military's message, "does not affect the law school's speech, because the schools are not speaking when they host interview and recruiting receptions." *Id. at 1309.* In addition, permitting military recruiters on campus does not suggest that the law schools agree with the message being expressed by the recruiters. The court emphasized that even high school students "can appreciate the differences between speech a school sponsors and speech the school permits because legally required to do so." *Id. at 1310.*

Similarly, the Corporation is not speaking when they stage an Air Show anymore than the law schools are speaking when they host a recruitment fair. An Air Show is conduct, not speech, and there is no evidence in the record that the public could or did perceive the Air Show itself to be a form of expression. In addition, there is no reasonable likelihood that the Plaintiffs will be seen as spokesmen for the Corporation merely because they are present in a public area of the Air Show. If high school students are sophisticated enough to understand the difference between sponsored speech and free speech, the public attending an Air Show can as well.

In *Rumsfeld*, the Supreme Court also rejected the law schools' argument that their freedom to engage in

expressive association was violated by the *Solomon Amendment*. The Supreme Court said:

> Law schools . . . "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students--not become members of the school's expressive association. This distinction is critical . . . The law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying conduct is undertaken for expressive purposes, cannot make it symbolic speech . . . so too a speaker cannot "erect a shield" against laws requiring access "simply by asserting" that mere association "would impair its message."

Rumsfeld, 126 S. Ct. at 1312. Similarly, the Corporation's statement that the Air Show is to honor the military and veterans does not transform the Air Show into symbolic speech. Nor can the Corporation create a protective shield by merely asserting that its message will be impaired by association with the Plaintiffs.

Indeed, in *Rumsfeld*, the Supreme Court reaffirmed its earlier decision in *PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)*, which is closely analogous to the facts before this Court. In *PruneYard*, the Supreme Court found

that the *First Amendment* rights of a shopping center owner were not infringed by the California Constitution which required the owner to permit solicitations and leafleting on its private property. The shopping center was open to the public, but had a policy that prohibited any expressive activities, including the circulation of petitions. The policy was strictly enforced in a nondiscriminatory manner. Nonetheless, the Supreme Court held that the State of California could require the shopping center to allow students to set up a table and distribute literature opposing a UN resolution against Zionism. The Supreme Court said:

> The shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. . . . Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

PruneYard, 447 U.S. at 87.

Like the owners of the shopping center in *PruneYard,* the Corporation has invited the public onto the tarmac and was required to do so by the military in exchange for its airplanes, personnel and equipment. In this environment, there is no reasonable likelihood that the public will conclude that the Plaintiffs' message reflects the beliefs of the Corporation. As was done in 2005, the Corporation can post signs indicating its disapproval of public expression at the Air Show. [8]

A Designated Public Forum or Nonpublic Forum?

The Plaintiffs continue to argue that the Air Show has been designated by the City and the Corporation as a forum to discuss the military and war. Therefore, any *First Amendment* restrictions on the tarmac are subject to strict scrutiny. This argument is reminiscent of the Corporation's position that the Air Show itself expresses support for veterans and current military, and any competing speech violates the Corporation's *First Amendment* rights.

For purposes of this litigation, both parties would like to make the Air Show something it is not. The Air Show is a fair like event that entertains and educates and provides a good crowd for Memorial Day ceremonies. There is no persuasive evidence that the Corporation or the City intends the Air Show be a place to discuss the military or the war, and there is no evidence that most people come to the Air Show to hear speeches on any topic. [9]

Furthermore, merely because the Corporation speaks when it distributes programs, announces events or conducts the noontime program to honor veterans, does not mean that it intentionally opens the event for

public comment on these subjects. Every time a state actor holds a public event and speaks at it does not mean that the state actor is intentionally creating a designated public forum. *See Families Achieving Independence and Respect (FAIR) v. Nebraska Dep't of Social Services, 111 F.3d 1408, 1418 (8th Cir. 1997)* (en banc).

VI. What Restrictions are Reasonable?

A. Leafleting, but not Petitioning

The Plaintiffs contend that the fair like environment of the Air Show is compatible with petitioning, given the other activities which are permitted on the tarmac and the open spaces that are apparent. Admittedly, an airport tarmac is not the same as an airport terminal. Both, however, serve a public that comes for a specific purpose. In the case of the Air Show, most people come to see aerobatic maneuvers by airplanes. In that environment, petitioning poses a slight risk that the public's enjoyment will be compromised if it is distracted by petitioners or people soliciting money. Petitioning requires, at a minimum, substantive communication about the content of a petition, a request for a signature and a refusal. In contrast, leafletters can be dissuaded with the wave of the hand.

While it is true that the public interacts with many other people on the tarmac during the Air Show, almost all that contact is initiated by the public. The military recruiters do not go into the crowd and solicit recruits. Souvenirs, books, food and other commercial items are sold from booths or tables. It is not unreasonable, under these circumstances, that the Corporation prefers to give the public the right to initiate substantive

communication rather than have it thrust on them. In contrast, leaflets, signs and expressive clothing are so minimally intrusive and can be so easily ignored, that there is little, if any, objective risk that the public will be distracted from viewing the show. For similar reasons, in *International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 690, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992)*, the United States Supreme Court found that a city could restrict all solicitations in an airport terminal but could not prohibit leafleting even though the terminal was a nonpublic forum.

In support of its argument, Plaintiffs point to the case of *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth., 984 F.2d 1319 (1st Cir. 1993)*, where the First Circuit found that it was unreasonable to restrict petitioning in the Boston subway system. While the First Circuit discusses *Lee* in other contexts, it does not mention the finding in *Lee* that petitioning can be prohibited in an airport terminal. Either the First Circuit failed to follow Supreme Court precedent or, more probably, it found distinguishing facts because the subway system administrators gave no justification for the petitioning restriction and permitted newspaper sales and musicians, which created at least as much congestion as would be created by petitioners. For these reasons, the Court finds the Plaintiffs' argument unpersuasive. The Court is bound by Supreme Court precedent and there is not evidence that activities similar to petitioning are permitted at the Air Show.

The Court recognizes that Operation Simply Shred was allowed to come onto the tarmac and take leaflets from members of the public. Taking leaflets is not materially different from handing out leaflets. While some members of the public were permitted to actually

shred their own documents which required somewhat more interaction, it is not the same as petitioning, which requires substantive communication. Given the current record, the Court cannot say that Operation Simply Shred's conduct would justify a finding that petitioning or other forms of solicitation are compatible with the Air Show.

While the Plaintiffs object to the Court's limitation on petitioning, the Defendants object to the Court's finding that the Plaintiffs have a right to distribute leaflets at the Air Show. The Defendants cite *New England Regional Council of Carpenters v. Kinton, 284 F.3d 9 (1st Cir. 2002)*, and *Hawkins v. City and County of Denver, 170 F.3d 1281 (10th Cir. 1999)*, for the proposition that all leafleting can be banned at the Air Show. Both cases are distinguishable. The area in dispute in *Hawkins* was a 600 foot walkway connecting two theaters and a public parking garage. The walkway was between 32 and 40 feet wide and musicians sought to picket during peak traffic flow. The walkway was open all year so problems with traffic control would be difficult to manage.

In *New England Regional Council of Carpenters*, the First Circuit also found that safety considerations justified a complete ban of leaflets at Boston's Fish Pier. The Court emphasized that:

> the fishing fleet generates a great deal of activity; there is a high volume of truck traffic; and there appears to be precious little room in front of the ECC. What space is available serves primarily as a roadway and truck turnaround. In these cramped confines, pedestrian safety and traffic flow

> are vital concerns. The validity of these concerns is underscored by the fact that, when Massport erected concrete bollards to protect the entrance to the ECC several years ago, the bollards were so severely damaged by trucks executing turnarounds that Massport had to remove them. Thus, although there are few, if any, problems intrinsic to the act of leafleting, safety is a plausible concern here. . . . Given the peculiar setting of the ECC entrance, leafletters run a serious risk of obstructing vehicular traffic and distracting pedestrians as they traverse the roadway.

New England Regional Council of Carpenters, 284 F.3d at 25. In contrast, the Air Show is held in a huge, open area on only two days a year and neither Defendants have presented plausible evidence that leafleting poses a safety risk or would impair traffic.

Finally, merely because there were a few complaints about the Plaintiffs' *First Amendment* activity on the tarmac, does not justify excluding all leafleting. It is well established in *First Amendment* jurisprudence that speech which merely offends cannot be prohibited. In a democracy, the solution is more speech not less. This was aptly manifested by Operation Simply Shred.

B. Signs

The City permitted signs at the 2005 Air Show even though the Court's preliminary injunction order did not require it to do so. Other than a sign being carried at the noontime event to honor veterans, signs did not create any disruption. Given this record, it would be

unreasonable to implement a rule that prohibits all signs at future Air Shows. Like leafleting and expressive clothing, signs require no interaction with people observing the Air Show. The City and the Corporation implicitly recognized this when it permitted signs at the 2005 Air Show.

All *First Amendment* activities on the tarmac, including signs, are subject to reasonable time, place and manner restrictions which are viewpoint and content neutral.

VII. Noontime Event

No one has objected to the Court's finding that the City and the Corporation can restrict *First Amendment* activities on the tarmac during the Corporation's noontime event to honor veterans. The City, however, has requested the Court to include "a provision in the permanent injunction to the effect that the police may remove any person from the tarmac engaged in carrying a sign or in leafleting during the memorial who refuses to stop those forms of 'activity and speech' . . . ." City of Columbia's Brief Regarding Issuance of a Permanent Injunction at p. 17. Neither the Corporation nor Plaintiffs have objected to this request. The Court will interpret the City's request as an amendment to its pleadings and will address the issue in this Order.

VIII. Conclusion

After the 2005 Air Show, the Court had hoped that the parties would mediate their dispute and find an acceptable accommodation for their competing interests. They are in a much better position than the

Court to identify creative and nonconfrontational solutions. They have not done so. Accordingly, it is

ORDERED that:

Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment is GRANTED in part and DENIED in part.

1. Plaintiffs and similarly situated individuals may distribute leaflets at future Memorial Day Air Shows at the Columbia Regional Airport, subject to the permissible restrictions identified in this Order.

2. Plaintiffs and similarly situated individuals may carry signs at future Memorial Day Air Shows at the Columbia Regional Airport, subject to permissible restrictions identified in this Order.

3. Plaintiffs and similarly situated people may wear expressive clothing, hats and buttons at future public Air Shows at the Columbia Regional Airport, subject to the permissible restrictions identified in this Order.

4. The City and the Corporation do not violate the *First Amendment* rights of the Plaintiffs and similarly situated people when they prohibit petitioning on the airport tarmac during the Air Show, so long as their rules and enforcement practices are content and viewpoint neutral.

The City's Counterclaim for a declaratory judgment is also GRANTED.

1. The City and the Corporation do not violate the *First Amendment* rights of the Plaintiffs and similarly situated people when they prohibit *First Amendment* activities during the noontime event to honor veterans.

2. The City may remove any person from the tarmac engaged in *First Amendment* activities during the noontime event to honor veterans. This includes persons who distribute leaflets or carry signs if the person refuses to stop carrying the sign or distributing leaflets during the noontime event.

NANETTE K. LAUGHREY

United States District Judge

Dated: March 31, 2006

Jefferson City, Missouri

CLERK'S JUDGMENT

Decision by Court. This action came to trial or hearing before the Court. The issues have been determined and a decision has been made.

IT IS ORDERED AND ADJUDGED that pursuant to the Order entered by the Honorable Nanette K. Laughrey on March 31, 2006, Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment is GRANTED in part and DENIED in part.

1. Plaintiffs and similarly situated individuals may distribute leaflets at future Memorial Day Air Shows at the Columbia Regional Airport, subject to the permissible restrictions identified in this Order.

2. Plaintiffs and similarly situated individuals may carry signs at future Memorial Day Air Shows at the Columbia Regional Airport, subject to permissible restrictions identified in this Order.

3. Plaintiffs and similarly situated people may wear expressive clothing, hats and buttons at future public Air Shows at the Columbia Regional Airport, subject to the permissible restrictions identified in this Order.

4. The City and the Corporation do not violate the *First Amendment* rights of the Plaintiffs and similarly situated people when they prohibit petitioning on the airport tarmac during the Air Show, so long as their rules and enforcement practices are content and viewpoint neutral.

The City's Counterclaim for a declaratory judgment is also GRANTED.

a. The City and the Corporation do not violate the *First Amendment* rights of the Plaintiffs and similarly situated people when they prohibit *First Amendment* activities during the noontime event to honor veterans.

b. The City may remove any person from the tarmac engaged in *First Amendment*

activities during the noontime event to honor veterans. This includes persons who distribute leaflets or carry signs if the person refuses to stop carrying the sign or distributing leaflets during the noontime event.

Dated: March 31, 2006

By: Renea Kanies, Courtroom Deputy

Footnotes

1 The Court incorporates by reference its May 18, 2005 Order ("Order") [Doc. 57], including the facts which were included in that Order.

2 Because the 2005 Air Show has now passed, Plaintiffs' request for a permanent injunction, as it relates to the 2005 Air Show, is moot. However, both parties have indicated that this will be an ongoing dispute and both have requested the Court to take these additional facts into account to resolve the Plaintiffs' request for declaratory judgment and permanent injunction. Therefore, the Court has considered both these supplemental facts, as well as the facts that were presented at the preliminary injunction hearing, to resolve the Plaintiffs' request for declaratory judgment and permanent injunction.

3 The food booths remained open during the solemn ceremony to honor fallen soldiers. Def. Ex. 15 (Martin Dep.) at 83:11-13. Although Posner testified that the food stalls were closed during this event, which

occurred over the noon hour, the Court finds Officer Martin's testimony more credible.

4 The Court will not restate here the legal authority for its conclusions. Its May 18, 2005 Order is incorporated verbatim and contains the relevant legal authority.

5 Posner's exact quotation is, "In the entire 17 years that I've been associated with this effort, we have never asked the City of Columbia for anything, other than approval of our 2535's to obtain the tarmac in order to hold the two-day air show." Def. Ex. 190 (Posner Dep.) at 23:2-7.

6 In *Hurley*, The Supreme Court specifically stated that it was not addressing the question of whether the parade constituted state action. Because the Court has found that both the Corporation and the City are state actors, *Hurley* is irrelevant. Nonetheless, because Defendants' primary focus has been on *Hurley*, the Court will explain why it is inapplicable to the Air Show, even if the Corporation is not a state actor.

7 The latter is sometimes referred to as "expressive association."

8 *PruneYard* stands for the proposition that the *First Amendment* rights of the Corporation are not violated if leafleting, petitioning, or other *First Amendment* activities occur on the tarmac. An entirely separate issue is whether the Plaintiffs have the right under the United States Constitution to distribute leaflets and to circulate petitions on the tarmac. That issue will be discussed in the next section.

9 Memorial Day parades and ceremonies in Columbia did not historically attract large crowds. Salute to Veterans was organized in the 1980's because Memorial Day festivities then consisted of "five men gathering at the courthouse for 5 minutes of speeches. If it rained, they [held] it in the garage of the funeral home." Def. Ex. 110. It is, therefore, logical to conclude that many, if not most, of the 25,000 people who attended the 2005 Air Show were attracted to the exhibits and aerobatic displays of aircraft and not the speeches or other expressive activity sponsored by the Corporation at the Air Show.

Case No. 05-4061-CV-C-NKL

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI,
CENTRAL DIVISION

BILL WICKERSHAM and MAUREEN DOYLE,
Plaintiffs,

v.

CITY OF COLUMBIA, MISSOURI and MEMORIAL DAY WEEKEND SALUTE TO VETERANS CORP.,
Defendants.

May 18, 2005, Decided
May 18, 2005, Filed

COUNSEL: For Bill Wickersham, Maureen Doyle, Plaintiffs: Dan Viets, Dan Viets Law Office, Columbia, Mo; Marilyn S. Teitelbaum, Schuchat, Cook & Werner, St. Louis, MO.

For Columbia, City of, Defendant: Robert J. Krehbiel, King, Krehbiel, Hellmich, Hentz & Borbonus, St. Louis, MO.

For Salute to Veterans Corp., Defendant: Dale C. Doerhoff, Cook, Vetter, Doerhoff & Landwehr, P.C., Jefferson City, MO.

JUDGES: NANETTE K. LAUGHREY, United States District Judge.

OPINION BY: NANETTE K. LAUGHREY

OPINION

ORDER

I. Summary

Plaintiffs Bill Wickersham ("Wickersham") and Maureen Doyle ("Doyle") seek a preliminary injunction so that they can distribute leaflets and circulate petitions at a Memorial Day Air Show which is to be held at the City of Columbia's airport. Because it is likely that Doyle and Wickersham will be partially successful on the merits and will be irreparably harmed if an injunction does not issue, the Court will grant some but not all of the relief sought by the Plaintiffs.

The Memorial Day Air Show ("Air Show") is to be held on May 29 and 30, 2005, at the Columbia Regional Airport ("Airport"), which is owned by the City of Columbia ("City"). The Air Show consists of an aerial display viewed by the public from a designated part of the Airport tarmac. In addition to the aerial display, various booths and stationary displays are authorized to occupy the designated tarmac. The Defendant, Memorial Day Weekend Salute to Veterans Corporation ("Corporation"), does not permit any unauthorized displays or booths, but the Air Show is open to the public because the federal government will not permit the use of its planes unless the public can attend.

Although the entire event is open to the public, including the designated tarmac where the public comes to watch the show, the Defendants claim that the Corporation has the authority to exclude anyone from the public crowd who does not meet its approval. To

support this proposition, Defendants point to a contract between the City and the Corporation which gives the Corporation exclusive control over the designated tarmac, subject only to the City's right to retake possession of the tarmac in the event of an undefined emergency. This contract was executed despite a City Ordinance which specifically provides that the City cannot cede control of any part of the Airport to a third party. [1]

The City and the Corporation contend that, regardless of the ordinance, the City has no power to require the Corporation to permit any free speech at the Air Show because to do so would interfere with or dilute the Corporation's message. According to the Corporation, the message of the Air Show is to honor and remember veterans, and if any group or individual engages in any expression unapproved by the Corporation, it would violate the Corporation's right to free speech because the Corporation does not want to be associated with anyone else's message.

The problem with the Defendants' argument is that the City is inextricably involved in the Memorial Day Air Show and, therefore, neither the Corporation nor the City has a right to control all expression at this public event. The City runs the Airport during the Air Show and provides other necessary support such as special police, fire and sanitation resources. While the Corporation plans the order of the aerial demonstrations, the plan must be approved by the City's Airport personnel. While the Corporation contracts with the federal government and other pilots to bring their planes to the City and pays for some to come, [2] it simply cannot make the planes fly without the contemporaneous operation of the Airport by City

personnel. Furthermore, the federal government will not even send its planes unless the City attests that the City is making the Airport available for the Air Show and it is officially supported by local government.

This is not like turning over a city park to a private organization and letting them put on an event to honor and remember veterans, or to individuals for a family reunion, or even having an arts festival on all the city's streets. Under those circumstances, the private group merely has the use of public property and, therefore, could exclude whoever they wanted even though the event is occurring on public land and open to the public.[3] In contrast, once the city becomes a substantial, necessary and active participant in the event, it cannot rely on superficial distinctions created by contract to insulate itself from constitutional obligations. While the Corporation has 3,000 volunteers and spends about $ 100,000 each year for the event, it is undisputable that the Air Show could not occur without the substantial involvement of the City before, during and after the event.

Because of the symbiotic relationship between the City and the Corporation, the Constitution does not permit them to exclude all unapproved expression. On the other hand, the Constitution does permit reasonable time, place and manner restrictions. Most of the Air Show is devoted to entertainment, but there are events during that Air Show which specifically recognize the sacrifices made by the current and former men and women in the armed services. During such solemn events, the Defendants can exclude leafleting, protests, petitioning, or any other speech or activity that might distract the crowd or offend those whose loved ones are being recognized. [4] But the Defendants

may not simply say that the entire Air Show is to honor and remember veterans and, therefore, any message other than ones approved by the Corporation will distract, mar or offend.

Because the Court finds the Air Show to be a nonpublic forum, it is permissible for the Defendants to exclude all petitioning. The Supreme Court has permitted such restrictions in the terminal of an airport which also contained substantial other commercial activity and this is closely analogous to the event at hand. The Defendants cannot, however, exclude all leafleting. The Supreme Court and other courts have recognized in similar circumstances that leafleting cannot be prohibited. Nor can the Defendants ban all protests because such a rule is patently overbroad and vague. For example, the Defendants cannot exclude clothing which expresses a viewpoint with which the Corporation disagrees.

While all *First Amendment* activities at the Air Show are subject to reasonable time, place and manner limitations, any rules adopted by either Defendant must be content neutral and must be uniformly enforced. For example, the Defendants cannot let in a sign which says "God Bless our Troops" and exclude a sign which says "God is Watching," which was done in the past.

Defendants do retain control over who will be permitted to fly in the Air Show and who may sell goods or have a booth at the event. The Defendants, and in particular the Corporation, have an interest in controlling who is perceived to be associated with them. A reasonable person would not think that someone handing out leaflets in a crowd represents the

viewpoint of the organizers of an event absent some identifying mark. However, they could reasonably associate the Corporation with the booths and displays at the event. Just because the Corporation has entwined itself with the City, that does not mean that the Corporation's interests are to be ignored. All three parties in this dispute are entitled to have their respective interests protected in such a way as to not interfere with the objective interests of the others.

II. Facts

A. Corporation's Background

Prior to the Corporation's formation and the inception of the Air Show, the City did not have many activities to celebrate Memorial Day. When Mary McCleary Posner ("Posner"), the president of the Corporation, first moved back to Columbia in the 1980s, the Memorial Day festivities consisted of "five men gathering at the Court House for five minutes of speeches. If it rained, they [held] it in the garage of the funeral home." Def. Ex. 110. To correct the situation, Posner worked with five veterans from the Korean War and they decided to have a parade and, eventually, they came up with the idea of an Air Show.

The Corporation was officially organized in 1991 as a private not-for-profit corporation. Pl. Ex. 1. Its mission statement is: "To Honor and Remember those who served, those currently serving in our Armed Forces, Guard, Reserves, and our Allies." Def. Ex. 110. In her deposition, Posner stated that the purpose of the Corporation was not to glorify war. Posner Dep. at 49:18-22.

The Corporation sponsors two major events during the Memorial Day weekend: (1) a parade through downtown Columbia on Memorial Day, and (2) a two-day Air Show that is held at the Columbia Regional Airport. Def. Ex. 121, 127.

B. Air Show

The Corporation's Air Show is defined as "the aerobatic and static display of aircraft and related exhibits, a static antique automobile show together with the sale of food for consumption on the Airport grounds and entertainment events and related activities." Pl. Ex. 5. The Air Show usually draws approximately 30,000 people. Pl. Ex. 6 and 7.

The Air Show is held on a secured tarmac of the Airport, which is owned by the City of Columbia. Boston Dep. at 6:22-24. [5] The City provides use of the Airport to the Corporation free of charge. Posner Dep. at 249:19 to 250:3. The Airport is located outside the Columbia city limits in an unincorporated area of Boone County, but is owned by the City. Boston Dep. at 6: 25 to 7:10. The Air Show is open to the public and is free of charge. Def. Ex. 122. The federal government, which has provided planes and personnel for the Air Show, requires that the event be open to the public; otherwise, it will not participate. Pl. Ex. 6 and 7.

On the map of the Airport contained in Plaintiffs' Exhibit 22, the area outlined with the words "Crowd Area Static Displays" is the tarmac that the public is allowed to enter during the Air Show. Pl. Ex. 22. The tarmac is enclosed with a fence and there are three gates onto the tarmac from the parking area that help control ingress and egress of the crowds. Posner Dep.

at 127:1-4. All three gates are open to the public during the Air Show. Pl. Ex. 26 (public map identifying three gates as Entrances to the Air Show). The tarmac is not open to the public except during the Corporation's Air Show. Boston Dep. at 112:1-20. When the tarmac is not being used for the Air Show, airplanes park there and cargo and commercial flights arrive there. Boston Dep. at 112:1-10.

During each of the two days of the Air Show, the Corporation sponsors a ceremony during the middle of the day. Annette Sanders ("Sanders"), the former volunteer media chair for the Air Show, testified at the hearing that during the ceremony, they play the national anthem, lower the flag to half staff, read the names of the 225 Boone County veterans who have died during combat, and then play Taps. During the hearing, the Corporation's counsel stated that they used to read the names at the Boone County Courthouse ceremony at the conclusion of the parade, but they moved it to the Air Show because there is a larger crowd at the Air Show.

To book the aircraft for the Air Show, the Corporation often has to pay the owners of private aircraft an appearance fee and reimburse the aircraft owners for their fuel and other expenses, including lodging, meals, and transportation costs. It also gets planes and equipment from the federal government, but pays only for the travel expenses of the government employees. In addition to aerial support from the federal government, the Corporation receives support from the Boone County Fire Department and the University of Missouri-Columbia ambulance services for emergency services. Boston Dep. 33:19 to 34:1. The University of Missouri-Columbia, the Missouri

Highway Patrol, and the Boone County Sheriff's Department also provide law enforcement personnel to work security at the Air Show at no expense to the Corporation. City Police Captain, Michael Martin ("Martin") Dep. at 74:10-25; 76:5-20. The Corporation estimates that it spends $ 100,000 per year to sponsor the Air Show. The Corporation has 3,000 volunteers and 65 committee chairpersons, including a board of directors who work on the Air Show and its other activities.

1. Air Show Rules

The Corporation has adopted a number of rules concerning the Air Show. Some of those are found on the Corporation's website and include:

> – No coolers, picnic baskets, no alcohol, no pets
>
> -- No bikes, tricycles, scooters or roller blades
>
> -- No smoking inside the gates
>
> -- No unauthorized sales
>
> – No petitioning
>
> -- No soliciting
>
> – No political campaigns

Def. Ex. 122. The Corporation also communicates these spectator restrictions in its press releases and fact sheets. Def. Ex. 144 and 148. In 2003, the Corporation's restrictions expanded to prohibit umbrellas, glass containers, and signs. Pl. Ex. 4.

The Corporation fleshes out its prohibitions in its Security Detail which is given to the City Police who provide security at the Air Show. Specifically, the instructions state: "No protests are permitted inside the tarmac fence. No signing of petitions for any reason, and no passing of handbills for any reason is permitted inside the tarmac. Authorized programs, and authorized handout materials on the part of exhibitors is permitted." Pl. Ex. 29.

In preparation for the 2003 Air Show, the Columbia Police Department created an intra-office security memorandum that anticipated how it would respond to protesters at the Air Show. The memorandum stated:

> [Protesters] are not allowed to enter onto the tarmac area and are restricted to protesting outside of the Columbia Bust Gate, noted as Gate # 1 . . . . Should protestors attempt to enter the premises, officers will immediately advise the Command Center and will stop their forward progress . . . . Any person who persists in entering will be given a trespass warning prior to arrest. Keep in mind that persons are not restricted from entering, only those who intend to conduct a protest once entry is made. . . . Once given a trespass warning, any person who attempts to enter onto the airport property is subject to arrest. The Tarmac Supervisor and Law Enforcement Security Commander should be notified. A representative of [the Corporation] will be asked to respond. Should the person continue to refuse to obey

> directions the representative from [the Corporation] may request that person be arrested for trespassing and will sign the summons issued to the arrested person.

Pl. Ex. 43. *Also see* Pl. Ex. 29 for the Columbia Police Department's security form which is used to implement this policy.

The Corporation, by its president, Mary Posner, is the ultimate arbiter of what speech is allowed to occur on the tarmac and she alone decides whether particular conduct violates the restrictions outlined above. Martin Dep. 51:21 to 52:1; Pl. Ex. 43 (instructing officers to contact the Corporation representative in the event of protesters). Martin testified that, "if [Posner] says that she does not want somebody on her property, regardless of what her reasoning is, I would ask that person to leave," even if the reason was the person's race or viewpoint. [6] Martin Dep. 67:24 to 65:2.

In her deposition, Posner testified that the Corporation's restrictions on leafleting and handbills would prevent disruptions at the Air Show, debris on the tarmac, and increase the enjoyment of the public. Posner Dep. 235:22 to 236:7. Posner also expressed concern that distributing information on the tarmac would cause the size of the crowd to increase; Posner Dep. 238:17-21, and "it just is not an acceptable way for us to be able to honor and remember." Posner Dep. 238:25 to 239:1.

Although the Corporation restricts protest activities on the tarmac, it does not restrict activities outside the fenced area. In his deposition, Martin, who was responsible for coordinating security at the Air

Show, testified that it was alright for individuals to protest or distribute leaflets or handbills anywhere outside the fenced tarmac area. Martin Dep. 117:13-21.

2. Speech Restrictions at Prior Air Shows

At the 1999 Air Show, Plaintiff Doyle carried a sign around the tarmac that stated, "God Bless our Troops." Doyle Dep. at 8:5-11. Doyle estimated that the sign was approximately two by three feet in size. Doyle did not hand out leaflets during her 1999 visit to the Air Show. Doyle Dep. 8:25 to 9:2. Doyle estimated that she walked around the tarmac with the sign in front of her for approximately ninety minutes. At the same Air Show, Steve Jacobs was refused entry onto the tarmac because he was carrying a sign that said, "God is watching." Wickersham Dep. at 68:2-16. Wickersham testified that a City police officer tore up the sign and refused entry for Steve Jacobs. Wickersham Dep. at 68:2-16.

Doyle attended the Air Show on Saturday, May 29, 2004, and tried to distribute fliers with the following quotes:

> Thoughts On War and Peace
>
> "We have grasped the mystery of the atom and rejected the Sermon on the Mount. Ours is a world of nuclear giants and ethical infants. We know more about war than we know about peace, more about killing that [sic] we know about living." -- General Omar Bradley
>
> "Why is it so easy for us to be willing to pick up arms and risk our lives, and so

> difficult to put down those same weapons and still risk our lives - in the cause of life?" - - Rams Kysia, a young Muslim-American peace activist

Pl. Ex. 33. After she had distributed some leaflets, a City police officer approached Doyle and told her she could not distribute them. Doyle Dep. 23:2-4. During this interaction, the officer advised Doyle that he would arrest her if she continued to hand out leaflets. Doyle Dep. 23:5 to 26:13. The officer who approached Doyle was riding a bicycle and he was wearing a yellow t-shirt, navy blue shorts, and a bike helmet. Doyle Dep. 22:13-19. The officer was also wearing an identification badge that had the words "Columbia Police Department" on it. Doyle Dep. 27:4-11.

Approximately seven additional officers subsequently arrived on the scene and they were dressed the same as the original officer who approached Doyle. Doyle Dep. 26:14-17, 26:22-23. One of the newly-arrived officers grabbed some of Doyle's fliers out of her hands, and Doyle subsequently left the Air Show. Doyle Dep. 29:7-25.

At the 2004 Air Show, Wickersham also attempted to collect signatures for a petition for renewable energy. Wickersham Dep. at 14:11 to 15:6; Pl. Ex. 31. Wickersham would ask individuals if they wanted to sign the petition; if they refused, then he did not ask them again. Wickersham Dep. At 16:24 to 17:4.

Wickersham was standing approximately thirty to forty yards inside the tarmac when a City police officer approached him and told him he could not circulate his petition. Wickersham Dep. 30:10-15. The officer

handcuffed Wickersham and took him to the police department's command post at the Air Show. Wickersham Dep. 32:5-16. The officers at the command post confiscated Wickersham's clipboard and issued him a citation for trespassing. Pl. Ex. 32 and 32A. Martin consulted with Posner regarding Wickersham and Posner instructed Martin and the officers to arrest Wickersham for trespassing. Martin Dep. at 54:5-10. Neither the police report nor Martin's testimony at his deposition reflect that Wickersham was being disruptive. Pl. Ex. 32A; Martin Dep. at 64:3-7. To date, the City has not prosecuted the trespassing citation against Wickersham, but the matter is still pending. Wickersham Dep. at 34:15-18.

a. Future Speech

Doyle testified that she intends to distribute leaflets again at the 2005 Air Show. Doyle Dep. at 33:5-13. Wickersham is not sure whether he will attend the 2005 Air Show or attempt to engage in free speech activities at the 2005 Air Show.

b. Speech At the Air Show By Parties Other than Plaintiffs

In her deposition, Posner testified that at one of the Air Shows in the late 1990s, Posner observed a group of protesters on the tarmac who were holding a banner that Posner believed was anti-military, although she cannot remember the details of the banner. Posner Dep. 209:18 to 212:10. Posner testified that there were six individuals carrying the banner and that they were blocking the entrance onto the tarmac. Posner Dep. 209:18 to 212:10.

In another incident in the late 1990s, Posner testified that there were six people on the tarmac

circulating a petition against cockfighting and another issue, although Posner did not know what the other issue was. Posner Dep. 212:15 to 217:22. Posner stated that some patrons of the Air Show complained to her that the circulators were harassing them and their families by repeatedly asking them to sign the petition and sticking clipboards in their faces. Posner Dep. 212:15 to 217:22.

Posner also testified that one individual who was distributing leaflets threw the leaflets in the air and left them as trash on the tarmac when the individual was asked to leave the Air Show. Posner Dep. 221:15 to 222:6.

c. Safety

In his deposition, Martin could not identify any security risk that may be attendant to allowing peaceful speech activity on the tarmac. Although leaflets distributed by protesters may increase debris on the tarmac, and thereby increase the risk of harm to the aircraft, Martin acknowledged that those risks are already present because there are authorized handouts and trash on the tarmac. Martin Dep. at 70:14-19.

Martin stated his only concern with free speech activity on the tarmac was the possibility of disruption or volatility due to unwanted petitioning. Martin Dep. at 44:14-19. In 2004, Martin stated that petitioning-related complaints were "minimal" and that he was aware of only the two speech-related incidents in 2004 which involved Wickersham and Doyle. Martin Dep. at 48:7 to 49:2. Boston has not witnessed any disruptions with speech-related activity on the tarmac, although he indirectly heard about the problems with petitions. Boston Dep. at 76:2 to 77:1.

3. Other Activities at the Air Show

a. Vendors

In addition to the aerial and static displays of the aircraft, other activities take place on the tarmac. Numerous vendors sell food, beverages, ice cream, and souvenirs on the tarmac. Pl. Ex. 26. Posner testified that there were four food and beverage tents, two ice cream vendors, and three souvenir tents, all of which are on the tarmac. Posner Dep. at 99:13-20. Civic organizations, like the Columbia Downtown Optimist Club, staff some of these vendor booths and they split the profits with the Corporation. [7] Posner Dep. at 97:19 to 98:4. In 2004, the University of Missouri Bookstore was allowed to sell approved books on the tarmac and conduct a book signing. Posner Dep. at 96:22 to 97:12. Boy Scouts also offer souvenir programs on the tarmac during the Air Show in return for a five dollar donation. Posner Dep. at 103:6-10.

b. Recruiters

Armed forces recruiters staff booths on the tarmac and provide handouts to patrons of the Air Show. Specifically, recruiters from the Army, Navy, Navy Reserve, Marine Corps, Air Force, Air Force Reserve, Coast Guard, and Missouri National Guard are all on the tarmac during the Air Show at booths for their respective branch of the armed forces. Pl. Ex. 26.

In addition to their recruiting booths, the recruiters from the armed forces also set up exhibits for patrons of the Air Show. Those exhibits include: an Army climbing wall, NASCAR, adventure van, and shooting gallery; a Navy Taj Mahal; Air Force Raptor and van; Marine Corps obstacle course; and multiple National Guard vehicles and pieces of equipment. Pl. Ex. 6. Plaintiffs

contend that the recruiters circulated in the crowd and handed out materials, but the Court does not find sufficient support in the record for that contention. [8]

c. Rejected Activities

Although the Corporation allows vendors and armed forces recruiters onto the tarmac, it does limit the presence of other organizations. For example, in March 1998, The American Legion inquired about staffing an information booth inside the tarmac during the Air Show. Def. Ex. 182. The American Legion was concerned that its organization did not have enough visibility during the Air Show. Def. Ex. 182. The Corporation rejected The American Legion's request and wrote: "We do not allow any booths, tables or handouts at our events. . . . I think that you will understand that we are bombarded with requests to use the Memorial Day Weekend Salute to Veterans Celebration for other purposes than to 'Honor and Remember' and we say 'no' to all of them." Def. Ex. 119. However, the Corporation did encourage The American Legion to staff one of the vendor booths available on the tarmac and suggested: "The civic groups are encouraged to hang their banners on the tent." Def. Ex. 119.

In her deposition, Posner testified that the Corporation receives approximately 50 to 150 requests every year from groups seeking display space on the tarmac during the Air Show. Posner Dep. at 268:17 to 269:21. Groups include the American Red Cross, a company from New York that wants to solicit bank cards from patrons of the Air Show, and the Columbia

Fire Department. Posner Dep. at 268:17 to 269:21, 274:7-17.

4. The Corporation's Advertising

The Corporation produces glossy posters to hang around the City in anticipation of the Air Show. Posner Dep. at 266:15 to 267:10; Def. Ex. 120. [9] The caption at the top of the poster states, "Memorial Day Weekend Corporation Air Show." Def. Ex. 120. The poster does not have the word "veteran" on it anywhere nor does it reflect that it is an event in honor of veterans. Def. Ex. 120. The Corporation distributes approximately 2,000 of these posters around the City. Posner Dep. at 266:15 to 267:10.

The Corporation also develops a 30-second public service announcement for the local television stations around the City. Posner Dep. at 267:5-13. The Court does not have the content of this public service announcement.

In addition to the foregoing, the Corporation produces a souvenir booklet that it provides to Air Show attendees in return for a donation. Def. Ex. 112-114. Although the brochures do not promote the Air Show in advance, they are used as promotional tools for both the Corporation and the Air Show. The cover of the 2002 booklet contains the Corporation's full name and the phrase "A Salute To Those Who Serve, Save and Protect Us." Def. Ex. 112. Inside the booklet, there is information concerning the Corporation's year-round efforts for the Air Show, logistical information (i.e., parking, vendor map, etc.) for the Air Show, and advertisements for businesses in the City area. Def. Ex. 112. Some of the businesses choose to honor and salute

veterans in their advertisements. For example, the McDonald's advertisement stated, "We Salute You! Thank you for your dedication." Def. Ex. 112 at p. 40. Another advertisement was purchased by Little Dixie Construction, L.L.C., and the advertisement stated, "A proud salute to America's Armed Forces." Def. Ex. 112 at p. 41. Both the McDonald's and Little Dixie advertisements also include their company logos and, in the instance of Little Dixie, contact information for the company.

While some advertisers in the brochure honor veterans with the text of their advertisement, many do not. For example, the inside back cover of the brochure was purchased by Columbia Ready Mix and it makes no mention of veterans. Def. Ex. 112. Similarly, the advertisements for Hertz and the University of Missouri Hospital make no mention of veterans or the Corporation's goal of honoring and remembering veterans. Def. Ex. 112 at pp. 42 (Hertz) and 24 (University of Missouri full page ad). Thus, the Corporation does not require that its advertisers incorporate its mission of saluting and honoring veterans and, instead, allows advertisers to control the content of their advertisements.

C. Role of the City in the Air Show

The City of Columbia devotes substantial public resources to the Air Show.

1. Resolutions and Agreements

The Airport is owned by the City. In 2000, 2001, 2002, 2003, and 2005, the Columbia City Council adopted resolutions authorizing Columbia's City

Manager to "execute an agreement with [the Corporation] for an Air Show to be held at Columbia Regional Airport." Pl. Ex. 5A-5E. The resolutions authorized the City Manager "to provide support services for the Memorial Day activities planned by [the Corporation] within the constraints of the city budget and taking into consideration the limited resources and operational duties of the various city departments." Pl. Ex. 5A-5E.

Pursuant to these resolutions, Raymond Beck ("Beck"), Columbia's City Manager, entered into agreements with the Corporation. Under the agreements, the City granted the Corporation "exclusive control, subject to the rights of tenants and the provisions of [the agreement], to control activities taking place on the [tarmac] during the time period of the event." Pl. Ex. 5A-5E. However, the City has an ordinance which provides: "The city shall, at all times, maintain full control of the airport. The city shall adopt no ordinance, resolution or motion and shall make no lease or contract with any person, including the United States Government, which will impair the City's control of such airport and its facilities. . . ." Columbia, Mo., Ordinance § 3-3, Ord. No. 10665 (1985) (attached as Pl. Ex. 38A).

Furthermore, the City still operates normal commercial air-traffic during the Air Show period and, of course, the tower is in operation for the Air Show. Boston Dep. at 21:6-21. Boston testified that the Airport "remains open" but that the airspace "may be closed at various times due to the aerobatic events" from the Air Show. Boston Dep. at 21:19-21. Boston also testified that in the event of an emergency, the Airport tower would order the Air Show to be stopped. Boston

Dep. at 92:8-12. Then the Air Show airplanes would clear the runway or other emergency area and Boston's emergency crew from the Airport would respond to the emergency. Boston Dep. at 92:8-12. Pl. Ex. 5A-5E at P23.

2. Planning and Coordinating Activities

To conduct the Air Show, the Corporation must submit a Ground Operations Plan ("GOP") to the Federal Aviation Administration ("FAA") for approval. The GOP includes information regarding the flight restrictions, areas of access on airport grounds, hazardous material plan for the Air Show, integrity of the runway and taxiway safety areas, movement area maintenance, crowd barriers, parking for aircraft, debris control, noise, fueling of aircraft, protection of the public, authorized vehicles, and other aspects of Airport oversight. Pl. Ex. 22. For 2004 and 2005, Boston prepared the entire GOP for submission to the FAA except for the schedule of events contained therein. Pl. Ex. 22 and 27; Boston Dep. at 14:6-24.

Boston and the other Airport staff incur additional job-related duties as a result of the Air Show. Boston Dep. at 62:12 to 63:8. The Corporation did not reimburse the City for any of these employees' time spent working on the Air Show. Boston Dep. at 63:9-13. In a June 2003 memorandum to the Columbia City Council, Beck also acknowledged that "while no direct financial support comes from [the City] for [the Air Show], the city does provide some in-kind support through airport staff time." Pl. Ex. 37.

Boston's help is undisputedly essential to the Air Show. Boston has described the Airport's role in the

Air Show as a "community partner" and as a "host." Pl. Ex. 25C; Boston Dep. at 81:1-4. In fact, Boston stated that without the City's support, the "Air Show couldn't take place." Boston Dep. at 9:8-12. In her deposition, Posner described Boston as "absolutely essential" to the Air Show's continuation. Posner Dep. at 151:21 to 152:2.

3. Air Boss Briefings and Meetings

Numerous City officials participated in the Air Boss briefings that immediately led up to and during the course of the Air Show. In his deposition, Boston estimated the Air Boss briefings took place both days of the Air Show and possibly on the Friday preceding the Air Show and the Monday immediately thereafter. Boston Dep. at 51:10-15. Specifically, Boston, the air traffic controller, an FAA representative, the City's fire chief, and Martin all participate in the briefings. Pl. Ex. 9.

In addition to the Air Boss briefings, Boston and Martin both regularly attend the Corporation's monthly meetings to plan for the upcoming Air Show. Boston Dep. 46:8-24.

4. Transportation

During the Air Show, The City helped coordinate shuttle services to and from the Airport to help alleviate parking limitations. In 2004, a City police officer arranged for a shuttle to be provided by a private organization to shuttle attendees to and from the Air Show. Martin Dep. at 73:3-6. Also in 2004, Martin was listed as a primary contact for the Air Show in an article published by The Columbia Missourian that discussed the shuttle service to the Air Show. Pl. Ex. 21.

5. Security

a. Security Plan

Prior to each Air Show, Martin and Boston work together to prepare a Security Plan. Under the Security Plan, Martin coordinates security for the public-access areas of the tarmac while Boston plans security for the non-public areas of the tarmac, including the airfield, taxiways, runways, and grassy areas. Boston Dep. at 36:14 to 38:15. During the Air Show, City police officers act in accordance with a Security Detail prepared by Martin, which is included as Pl. Ex. 29. The Security Detail outlines the uniform for the Air Show and specifies the rules for the Air Show, including the ban against "protesting." Pl. Ex. 29.

b. Personnel

The City police coordinate security for the Air Show. Posner Dep. at 103:25 to 104:4. In his role as a Columbia police officer, Martin has coordinated and directed security at the Air Show since 2001. Martin Dep. at 10:20-24. In addition to the City police, other agencies also provide personnel for security at the Air Show, including the Missouri State Highway Patrol, the Boone County Sheriff's Department, and the University of Missouri Police Department. Martin Dep. at 74:10-25. Each of the governmental agencies that employ these security officers pay their officers out of their respective operating budgets; the Corporation provides no reimbursement for the officers' time. Martin Dep. at 76:5-20. The City alone incurred over $ 15,000 in overtime compensation for providing its police officers for the Air Show, and this figure does not include time that officers committed to the Air Show

during their regular work schedules. Pl. Ex. 42; Martin Dep. at 83:21-25.

In addition to his other air-show-related duties, Martin annually attends the International Convention of Air Shows where he receives training and attends workshops related to Air Show security. Martin Dep. at 17:4-14. Posner and other Corporation officials also attended the Convention, but Martin was the only governmental employee to attend. Martin Dep. at 17:6-20. The Corporation pays for Martin's expenses at the Convention, but the City pays his salary while he attends the Convention during working hours. Martin Dep. at 17:21 to 18:12. The Convention includes a session regarding *First Amendment* activity at Air Shows and includes information for how to handle free speech activity during Air Show functions. Martin Dep. at 19:9-24.

6. Emergency Services

The City provides emergency services in the form of "crash, fire and rescue protection services, surveillance and equipment" during the Air Show. Pl. Ex. 5A-5E. Under the agreements, the Corporation does not pay for these services. Pl. Ex. 5A-5E. Boston helps coordinate the additional emergency services needed for the Air Show. Boston Dep. at 30:2-17. Some of these additional emergency services include support from the Boone County Fire Districts and the various ambulance services around the City. Boston Dep. 33:19 to 34:1. Posner testified at the hearing that the University of Missouri-Columbia provides some of its ambulances to support the Air Show.

7. Miscellaneous Services

The City also provides recycling bins for the Air Show, Boston Dep. at 43:14 to 44:10; and a pavement sweeper and a driver to keep the tarmac clean. Boston Dep. at 48:6 to 49:14. It has sent out articles about the Air Show with its utility bills which go to approximately 45,000 residents. Beck Dep. at 27:9 to 29:3. Pl. Ex. 13. In 2004, the City ran a front-page article about the Corporation's Air Show in CitySource, a City publication, but the Corporation did not pay any fee for the article to appear in CitySource.

The City's website also advertised the Air Show. In 2004, the City's website advertised the Air Show in the section of the City's website where residents could pay their utility bills. Pl. Ex. 30. The website invited the general public to attend the Air Show and "spend the day as we Honor and Remember our Nation's and our Allies' veterans, and say 'Thank You!' to current active duty members of our Armed Forces, members of the National Guard and Reserve and Allied Forces." Pl. Ex. 30. Moreover, on the Airport's official website, there is a link to the Corporation's website. Pl. Ex. 36D.

8. Public Confusion and Sponsorship

In its press releases and other materials, the Corporation tries to distance itself from the perception that the Air Show is sponsored by the City. In a 2004 Fact Sheet, the Corporation stated: "PLEASE NOTE: This event is in no way a function of or sponsored by the City of Columbia, its Chamber of Commerce, or the Columbia Convention/Visitors Bureau." Def. Ex. 155. In a Media Advisory dated April 2003, the Corporation stated:

> PLEASE NOTE: Do not refer to this as the "Columbia Airshow", "Columbia's" Memorial Day Airshow, this "Columbia event", "Columbia's Memorial Day Weekend", etc., or any other designation that would imply it is hosted, organized, or in any way produced or sponsored by the City of Columbia, Missouri. It is presented solely by [the Corporation], a registered 501(c)(3) not-for-profit corporation in the State of Missouri, which consists of 3000 volunteers and 65 volunteer committee chairmen. Media credentials are mandatory.

Def. Ex. 152.

The City holds itself out as a sponsor of the Air Show. To obtain federal military aircraft, the Corporation must submit specific applications to the armed forces and the FAA. In the applications, Beck signed in his official role as City Manager verifying that the Airport was available for the Air Show and that the Air Show was "officially supported by local government." Pl. Ex. 6 and 7.

Assistant City Manager Hiram Watkins has denied that the City is a sponsor of the Air Show, but admitted that its relationship is "more of a partnership." Watkins Dep. 20:16. Boston said that the Airport "hosted" the Air Show. Boston Dep. 80:19 to 81:4.

III. Standard of Review - Preliminary Injunction

In determining whether to grant a preliminary injunction, courts weigh four factors: (1) the probability that the movant will succeed on the merits; (2) the

threat of irreparable harm to the movant; (3) the balance between the harm to the movant and any harm that granting the injunction will cause to other parties to the litigation; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981).* In the context of *First Amendment* cases, courts normally assume irreparable injury because "the loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)* (citing *New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971)).* In *Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999),* the Eighth Circuit adopted this same approach citing with approval the above language from *Elrod. id. at 970.* Regarding the public interest and balancing of harm prongs of the *Dataphase* factors, the court added, "The potential harm to independent expression and certainty in public discussions of issues is great and the public interest favors protecting core *First Amendment* freedoms." *Id.*

Thus, because of the inherent public interest in free speech and the threat of irreparable injury if speech is suppressed, courts rarely focus on the three latter *Dataphase* factors; instead, they look primarily to whether the party seeking the preliminary injunction is likely to succeed on the merits. Following this precedent, the Court finds that Plaintiffs, and those similarly situated, will sustain irreparable harm if their constitutional right to speech is violated. While Wickersham has expressed ambivalence about attending the Air Show, Doyle asserts that she plans to attend to distribute leaflets and it is clear she will be

subject to criminal sanctions if she does so. The public has an interest in preventing constitutional violations, particularly ones involving speech, and the rights of the City and the Corporation will only be curtailed to the extent required by law.

IV. Are the Defendants State Actors When They Restrict *First Amendment* Activities at the Air Show?

The City of Columbia is a state actor because it is a creation of the state. *See O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 135 L. Ed. 2d 874, 116 S. Ct. 2353 (1996).* It is also treated as a person for purposes of *section 1983* and, therefore, can be held liable for constitutional violations if they are caused by an official city custom or policy. *Monell v. Dep't of Social Services of New York, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).* The City, however, argues that because it only enforces the Corporation's rules against leafleting and petitioning, it is not responsible for limiting Plaintiffs' speech activities. The Corporation claims that because it is a private party, it has the right to control all the speech on the tarmac, just as if it were real estate owned by the Corporation.

If the Corporation is a "private party" and the Air Show is held on their "private property," then Plaintiffs have no right to speech of any kind at the Air Show. A private party has the right to prevent free speech on its property, for a good reason, a bad reason, or no reason. "One great object of the Constitution is to permit citizens to structure their private relations as they choose, subject only to the constraints of statutory or decisional law." *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619, 114 L. Ed. 2d 660, 111 S. Ct. 2077*

(1991). On the other hand, if the Corporation is a "state actor" when it restricts speech, then in that limited context it will be treated like the government. *Lee v. Katz, 276 F.3d 550, 555 (9th Cir. 2002)* ("It is important to identify the function because 'an entity may be a State actor for some purpose but not for others.'") (quoting *George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996))*.

The Supreme Court has acknowledged that the state action doctrine has not been a model of consistency, perhaps because it is so fact dependent. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001)*; *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991)*. There is no single test for determining when there is state action, particularly when the dispute involves the *First Amendment.* Ronald B. Rotunda & John E. Nowak, 2 *Treatise on Const. L.*, § 16.4 n.1 (3d ed.). *See also Lee v. Katz, 276 F.3d 550, 554 (9th Cir. 2002)*.

In *Edmonson*, the Supreme Court held that two inquiries were paramount. First, does "the claimed constitutional deprivation[] result from the exercise of a right or privilege having its source in state authority . . . ." *Edmonson, 500 U.S. at 620.* Second, "whether the private party charged with deprivation could be considered in all fairness a state actor . . . ." *Id. at 620.* Relevant factors to consider are: the actor's receipt of governmental assistance and benefits, *Edmonson, 500 U.S. at 621*; whether the actor is performing a traditional governmental function, *Id.;* are the government and the private entity so entangled that it appears that the private entity is acting in concert with

the government, *Brentwood, 531 U.S. at 296*; whether there is such a close "nexus" between the government and the challenged action that it is fair to treat the private actor like the state, *Id.* (citation omitted); does the government provide "significant encouragement either overt or covert," *Blum v. Yaretsky, 457 U.S. 991, 1004, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982)*; and does a private actor operate as a "willful participant in joint activity with the state or its agents." *Brentwood, 531 U.S. at 296* (citing *Lugar v. Edmondson Oil Co., 457 U.S. 922, 941, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982))* (overview of factors). *See also Johnson v. Rodrigues, 293 F.3d 1196, 1203-05 (10th Cir. 2002)* (citations omitted); *Mentavlos v. Anderson, 249 F.3d 301, 313-14 (4th Cir. 2001)*; John Fee, *The Formal State Action Doctrine and Free Speech Analysis, 83 N.C. L. Rev. 569 (March 2005)*. This list is not all inclusive because the state action doctrine is contextual and no single factor is necessary for there to be state action. *Brentwood, 531 U.S. at 296.* In *Brentwood,* the Court stated:

> What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

531 U.S. at 295-96 (citations omitted).

In this case, there is evidence that the City has delegated to the Corporation functions traditionally and exclusively performed by government. The City Police are instructed by the City to report during the Air Show to the Corporation's representative, Mary Posner, and to follow her directives. Martin Dep. 51:21 to 52:1; Pl. Ex. 43 (instructing officers to contact a Corporation representative in the event of protesters). They will remove any people from the show that she tells them to exclude. [10] The police do not exercise discretion, but instead follow her directive. [11] *Id.*

Of course, merely providing police protection for a civic event does not transform a private entity into a state actor. *Reinhart v. City of Brookings, 84 F.3d 1071 (8th Cir. 1996)*; *United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1994).* The purpose of the City police force is to protect all citizens of the City and police officers routinely give tickets to people who are trespassing on private property. However, the Defendants have not provided another example of the City Police Department giving any other individual or organization the broad authority delegated to Posner. While she is not "chief of police for the weekend," as alleged by the Plaintiffs, she does have the power to direct the police, not just ask for their assistance, as is the norm for a private individual. No one can seriously contend that in other contexts it is the practice of the City police to automatically follow the directive of a private landowner without first exercising discretion.

While it is true that security is not a function exclusively conducted by the government, only persons authorized by the government to arrest people have the power to physically deprive a citizen of their freedom.

See Griffin v. Maryland, 378 U.S. 130, 12 L. Ed. 2d 754, 84 S. Ct. 1770 (1964). There, the Supreme Court held that a security officer employed by an amusement park was a state actor because the county had made him a special deputy and gave him a badge. He worked for the amusement park and he took his directions from the amusement park, but his power to arrest came from the sheriff and, therefore, he was a state actor, because only the state has the power to arrest. In this case, that power has been delegated to Posner to exercise as she deems appropriate. Furthermore, when making that delegation of authority, the City knew that she would exercise that authority to exclude *First Amendment* activity and gave her contractual authority to do so. This is not a case of mere acquiescence.

In *Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)*, the Supreme Court ruled that a creditor was a state actor when it took advantage of a state authorized procedure that permitted it to get a pretrial writ of attachment based solely on the creditor's ex parte affidavit. The use of the judicial system to get the writ and the involvement of the county sheriff in executing the writ was sufficient. In *Edmonson v. Leesville Concrete Co., 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991)*, the Supreme Court held that a litigant who exercised a peremptory challenge was a state actor because the state gave it the power to strike a juror and then enforced the discriminatory choice when made. Similarly, in this case, Plaintiffs' claimed constitutional deprivation occurred because the City authorized the Corporation to have exclusive control of public property knowing that the Corporation would restrict speech and then the

City police automatically enforced the Defendants' decision to exclude free expression.

In *Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2005)*, the plaintiff attempted to carry a religious sign and preach at an arts festival held on a blockaded street. The event was open to the public and permitted by the city. Under those circumstances, the Sixth Circuit held that the City of Columbus committed a constitutional violation when the festival's off duty police officer removed the preacher at the direction of the festival organizer. This was in part because the city had stated in advance that the festival organizer had complete discretion to exclude someone for exercising constitutionally protected rights.

While the Defendants claim that *Reinhart v. City of Brookings, 84 F.3d 1071 (8th Cir. 1996)*, absolves both parties of any responsibility for the restrictions which have been placed on Plaintiffs' efforts to leaflet and petition at the Air Show, *Reinhart* is distinguishable. In *Reinhart*, the City of Brookings only was being sued by a political candidate who wanted to have a booth at an art festival that was being held on city property but organized by and under the control of a private entity. The Brookings police patrolled the festival but did not give the festival organizers the authority to direct the police. The importance of this distinction is illustrated by Reinhart's reliance on *Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)*, which involved a creditor who was taking advantage of a state law which permitted self help to enforce a lien. The Supreme Court noted "that respondents have named no public officials as defendants in this action . . . . This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing

procedural restrictions on creditors remedies . . . ." *Flagg, 436 U.S. 149, 157, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978).* In the case before the Court, there is overt official action and the official action is controlled by Posner on behalf of the Corporation. The importance of this distinction is shown by the *Lugar* case which distinguished *Flagg* because only self-help was involved in *Flagg* but the creditors in *Lugar* had used the power of the government to enforce its claim.

In addition to satisfying the government function test, the facts also show that there is such a degree of entanglement between the City and the Corporation that it appears that the Defendants are acting in concert and thus both are state actors when they prevent all leafleting and petitioning at the Air Show. In *Reinhart,* the Eighth Circuit identified some of the relevant considerations: (1) Insurance coverage; (2) who provides planning, advertising, cleaning, managing and security; and (3) source of funds and benefits. *Reinhart, 84 F.3d at 1073; see also Brentwood, 531 U.S. at 311.*

Although the City and the Corporation claim that the Corporation has exclusive control over the Airport tarmac [12] for the Memorial Day Weekend Air Show, it is simply not true. The Airport Manager must retain control of the whole facility in order to comply with City law. *See* Columbia, Mo., Ordinance § 3-3, Ord. No. 10665 (1985) (attached as Pl. Ex. 38A) ("The city shall, at all times, maintain full control of the airport. The city shall adopt no ordinance, resolution or motion and shall make no lease or contract with any person, including the United States Government, which will impair the City's control of such airport and its facilities. . . ."). Furthermore, the contract gives the Airport Manager the authority to unilaterally resume control in the

event of an emergency. By analogy to property law, the City retains an easement.

More importantly, the event does not just occur on the secured tarmac. The event is the Air Show, which includes both the tarmac and the aerial displays. There is no evidence that the Corporation has the ability to have these aircrafts flying in and about the Airport without the integral involvement of the Airport staff, all of whom work for the City. Even if the Corporation may decide who can come onto the designated tarmac during the event, few would come to the tarmac, but for the planes and the planes could not fly without the contemporaneous management of the Airport by City personnel. There is clearly a symbiotic relationship between the City and the Corporation.

The symbiotic relationship is further proven by the fact that the federal government will not send its million dollar planes without approval of the City and the involvement of the City's Airport personnel. Pl. Ex. 6 and 7; Posner Dep. 60:2 to 62:15. City officials recognize this interdependence when they characterize their relationship with the Corporation as a partnership. Pl. Ex. 25C; Boston Dep. 81:1-4 (stating that the City and the Airport are a "community partner" with the Corporation and that the Airport serves as a "host").

This symbiotic relationship is also evidenced by the fact that people have to be repeatedly reminded that the show is not to be referred to as the "Columbia" Air Show. Def. Ex. 148, 150, 151, 152, and 155. The fact that this confusion occurs is because of the reality of the situation. The average person would expect that an air show is sponsored by a governmental entity and not a

private group when it occurs at a city airport, involves military planes and has services provided by the city, state, county, and federal governments. This appearance of state action is relevant because "the recognition that certain government-owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people." *Int'l Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 696, 120 L. Ed. 2d 541, 112 S. Ct. 2711 (1992).* In Rotunda and Novak, 2 *Treatise on Const. Law,* § 16.4 (3rd ed.), the authors state: "Of course, if the private actor was the agent or business partner of the government, it would be subjected to constitutional restraints. However, even though there is no partnership, these contacts may give the appearance of government action."

In addition to donating the use of its Airport to the Corporation, the City makes other in kind contributions to the event. City employees are intricately involved with the planning and coordination of the Air Show. Airport Manager Boston prepares the GOP that the Corporation submits to the FAA, he attends monthly planning meetings for the Air Show, and he spends substantial time attending to other details of the Air Show. Boston Dep. 14:6-24 (preparation of the GOP) and 46:8-24 (monthly meetings). The City donates Boston's time and other Airport employees' time free of charge to the Corporation. Boston Dep. 63:9-13. Not surprisingly, Posner characterized Boston's involvement with the Air Show as "absolutely essential" to the Air Show's continuation. Posner Dep. 151:21 to 152:2.

Columbia Police Captain Martin is also intricately involved with the Air Show. Martin has coordinated and directed security for the Air Show since 2001 in his role as a City employee. Martin Dep. 10:20-24. In this role, Martin develops a Security Plan for the tarmac area of the show and he distributes a Security Detail to officers who will work security during the Air Show. Martin also attends an annual Air Show convention with the Corporation organizers, with the Corporation paying his expenses, but the City paying Martin's salary while he is gone during working hours. Martin Dep. at 17:21 to 18:12. In addition, the City expends over $ 15,000 per year just in the form of overtime compensation for its officers that provide security to the Air Show. Pl. Ex. 42.

Finally, the City advertises the Air Show in its official publications and on its website, and the website for the Airport contains a direct link to the Corporation's website. Pl. Ex. 36D. [13]

Burton v. Wilmington Parking Authority, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961), demonstrates that the City and the Corporation are sufficiently entangled to justify the conclusion that they are state actors. There, the Supreme Court held that a restaurant that rented space in a government parking garage was a state actor when its owners refused to serve blacks. The land and building were owned by the city and rented to the restaurant. *Id. at 719.* The Supreme Court said: "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall

without the scope of the *Fourteenth Amendment.*" *Id. at 725.*

The Defendants are far more interdependent here than were the city and restaurant in *Burton.* Yet, Defendants try to distinguish *Burton* by saying it only applies to racial discrimination and the lease was long term, not short term. However, the Supreme Court continues to cite *Burton* in cases that do not involve race discrimination, *Brentwood, 531 U.S. at 311* (applying *Burton* symbiotic relationship test to high school athletic context); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 556-57, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987)* (applying *Burton* symbiotic relationship test to dispute over the use of the word "Olympic"), and Defendants have not explained why a long term versus short term lease makes a difference. In fact, a short term lease increases the risk of confusion about the City's relationship to the Corporation because it is so transitory, the public is unlikely to recognize any change.

Reinhart v. City of Brookings, 84 F.3d 1071 (8th Cir. 1996), gives further support for the conclusion that there is a sufficient symbiotic relationship here to support a finding of state action. While *Reinhart* held that a city was not responsible for the actions of a festival organization even though the festival was on city property, the Eighth Circuit specifically noted that the festival received no funding from Brookings, was staffed by volunteers and "had sole responsibility for planning, advertising, cleaning, managing and securing the 1994 festival. Except for a Brookings police officer who patrolled the area, the committee reimbursed the city for any city employees who helped clean and secure

the festival grounds." *Reinhart, 84 F.3d at 1073.* In contrast, the Corporation is given access to the infrastructure of the Airport, pays for none of the extensive support provided by the City, county, state, and federal governments, and uses the City's status to make arrangements for the actual Air Show. The City police do not merely patrol the area, as in *Reinhart;* they are told to comply with the directives given by the Corporation's representative.

In *Chicago Acorn v. Metropolitan Pier and Exposition Authority, 150 F.3d 695, 697-99 (7th Cir. 1998),* the Metropolitan Pier and Exposition Authority (MPEA), which was a governmental unit, rented the entire Navy Pier to the Democratic Party for one dollar. The Seventh Circuit held that all *First Amendment* activity, including leafleting, could not be banned from the entire pier even though the pier had been rented to a private party. The court noted that the pier was publicly owned and "so its owner, the MPEA, is subject to the *First Amendment* and as a result its discretion is curtailed." *Id. at 699.*

For other cases supporting a finding of state action, *see Lee v. Katz, 276 F.3d 550 (9th Cir. 2002)* (state action where private organization given exclusive control over free speech activities in a public forum); *Mood For A Day, Inc. v. Salt Lake County, 953 F. Supp. 1252 (D. Utah 1995)* (non-governmental fair board treated as state actor). *Also see,* John Fee, *The Formal State Action Doctrine and Free Speech Analysis, 83 N.C. L. Rev. 569, 571, n.8 (March 2005)* (private entity likely to be treated as state actor if government retains an easement on property deeded to private entity).

United Auto Workers, Local No. 5285 v. Gaston Festivals, Inc., 43 F.3d 902 (4th Cir. 1995), another authority relied on by the Defendants, is distinguishable. In that case the Fourth Circuit held that a festival is not a traditional exclusive governmental function and, therefore, the festival organizers were not state actors. "The government has not traditionally been the sole provider of community entertainment. Nor has it traditionally been the exclusive organizer of festivals, parades, or fairs. Fairs and festivals such as the Fish Camp Jam have traditionally been administered primarily by private organizations, like churches, civic groups, or local business consortiums." *Gaston, 43 F.3d at 908.* The Fourth Circuit went on to hold that "the possession of a permit to perform on public property what are ordinarily private functions does not convert the permit holder into a state actor." *United Auto Workers, 43 F.3d at 910* (citing *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974)).* In support of this conclusion, the Fourth Circuit said:

> Were we to hold that the incidental power to exclude others from public property during the course of a limited, permitted use transformed the permit holder into a state actor, softball teams on the Mall in Washington, D.C. would be constitutionally obliged to afford due process to those not allowed to play on the particular field at the same time. Every family that barbecues at a public park would theoretically be barred from excluding uninvited guests on constitutionally suspect grounds. The local church could no longer use public facilities to

> hold events for fear of violating the *Establishment Clause.* Every picnic, wedding, company outing, meeting, rally and fair held on public grounds would be subject to constitutional scrutiny merely because the organizer "had been granted exclusive use of city facilities . . . as well as authority to determine who may use those . . . facilities and what they may say while on the public fora."

Gaston, 43 F.3d at 911.

In contrast, an air show is not "traditionally . . . administered . . . by private organizations like churches, civic groups or local business consortiums," *Id. at 908*, and in *Gaston* the city played no role in planning or managing the festival, although the city did donate $ 10,000 annually. Nor did the city delegate police authority to the festival organizers. The *Gaston* court distinguished *Evans v. Newton, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966)*, specifically, because the city in *Newton* had continued to be involved in the park even after it relinquished ownership. In fact, *Gaston* never actually addressed the entanglement doctrine. The Fourth Circuit only considered the exclusive government function factor. This is evident from the Fourth Circuit's public policy concern about the collateral consequences of finding state action when a permit holder is deemed to be a state actor.

The Fourth Circuit was rightfully worried about making private events public merely because they were being held on public land. These concerns, however, are not present here because the City remains deeply involved in the staging of the Air Show. To find that the

Corporation is not a state actor also raises public policy concerns. Can a city avoid its constitutional obligation merely by the formality of a contract without in fact disengaging itself from the substance of the event? A wink and a nod should not be enough to eliminate the protections of the Constitution. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 148 L. Ed. 2d 807, 121 S. Ct. 924.* "If formalism were the *sine qua non* of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling. For example, a criterion of state action like symbiosis . . . looks not to form but to an underlying reality." *Id. at 302.*

For similar reasons, *Lansing v. City of Memphis, 202 F.3d 821 (6th Cir. 2000)* is not persuasive, both because it is factually distinguishable and because it is inconsistent with Supreme Court precedent. In that case, the Sixth Circuit declined to find that a festival organizer was a state actor. The festival organizer in *Lansing* provided its own security, and the public had to pay for admission to the event. The area surrounding the event was open to the public and it was in this public area that the city police evicted a preacher because the festival organizers found him offensive. The Sixth Circuit said that the festival organizer was not a state actor under the exclusive state function doctrine because the preacher was not on property controlled by the festival. In contrast, the Corporation is directing the City police on City property that has been temporarily given to the Corporation by the City for an Air Show that necessitates the continued involvement of City Airport personnel and police. The Sixth Circuit recognized the importance of this

distinction in *Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2005)*, when it said: "We have indicated that authorization of exclusive use of public property will shift potential liability from the government to the private entity who functions as a state actor." *Id. at 652.* In *Parks*, the Sixth Circuit found there was state action with facts analogous to the dispute at hand.

Moreover, the Sixth Circuit's insistence in *Lansing*, that virtually all the potential tests for determining state action must be satisfied to find state action is contrary to current Supreme Court precedent. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288 302-303, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2001).* In *Brentwood*, the Supreme Court held:

> It avails the Association nothing to stress that the State neither coerced nor encouraged the actions complained of. "Coercion" and "encouragement" are like "entwinement" in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead. Facts that address any of these criteria are significant, but no one criterion must necessarily be applied. When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test.

Id. at 303. Brentwood also undermines any suggestion advanced by Defendants that the Eighth Circuit does not use the symbiotic relationship test except in race discrimination cases. *See Lubin v. Crittenden Hospital Ass'n, 713 F.2d 414, 416 (8th Cir. 1983); also see San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 556-57, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987).*

Finally, Defendants suggest that the facts in *Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996)*, show much more entwinement between a government and a private entity, yet the Sixth Circuit found that city not liable for excluding *Sistrunk* from a public event held on public property. The Sixth Circuit, however, declined to decide the issue of state action in *Sistrunk* and relied on other grounds for its conclusion. In a nearly contemporaneous case, *Schwitzgebel v. City of Strongsville, 97 F.3d 1452 (6th Cir. 1996)*, the lower court had found there was state action with even less involvement than in *Sistrunk* and the decision was affirmed without discussion of the state action issue.

The Defendants cannot have it both ways, assuming all the benefits of a partnership but accepting none of the burdens. They act like partners; they are perceived to be partners; and therefore they cannot avoid the consequences of their choices by simply giving the Corporation exclusive, contractual control over the tarmac. They are both state actors when they implement and enforce the Corporation's rules concerning speech at the Air Show.

V. Hurley

During the preliminary injunction hearing, the City and the Corporation focused heavily on the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995).* The City claims that because of *Hurley,* it is constitutionally prohibited from interfering with the Corporation's decision to prohibit all leafleting, petitioning, protests, etc. at the Air Show. Therefore, it has no choice but to enforce the rules established by the Corporation.

The City is wrong. Because the Corporation is a state actor in the context of this *First Amendment* dispute, *Hurley* is irrelevant. In *Hurley,* the Supreme Court dealt only with the *First Amendment* rights of competing private actors. However, even if the Corporation was not a state actor, the City has the power to require the Corporation to open up the tarmac to leafleting and petitions because *Hurley* is no impediment.

In *Hurley,* a homosexual rights group sued a private organization that sponsored an annual St. Patrick's Day parade for permission to include a float in the parade. The group that organized and sponsored the parade was an unincorporated association of veterans who obtained a permit from the City of Boston, Massachusetts, every year. The Court held that the parade organizers, as a private organization, had a *First Amendment* right to express a certain viewpoint and, as a corollary to that right, the parade organizers could exclude homosexual groups whose message conflicted with the parade's message. The Supreme Court applied this same rational in *Boy Scouts of America v. Dale,* where it held that the Boy Scouts, as a private organization, had a *First Amendment* right to express

and convey certain values and that right authorized the Boy Scouts to exclude homosexuals from leadership positions. *530 U.S. 640, 147 L. Ed. 2d 554, 120 S. Ct. 2446 (2000).*

The Supreme Court in *Hurley,* however, only addressed whether parade organizers could be compelled to allow the gay rights group to *participate* in the parade. In fact, the Court in *Hurley* repeatedly referred to the gay rights organization's attempt to participate in the parade--not just attend it. *See Hurley, 515 U.S. at 570, 573* (the court emphasized that the gay rights organization wanted to participate "as a unit in the parade . . . for the very purpose of marching in it . . . ."). Moreover, the *Hurley* opinion stated that allowing the gay rights organization to participate in the parade "essentially required [the parade organizers] to alter the expressive content of their parade" because "every participating unit affects the message conveyed by the private [parade] organizers." *Id. at 573.* Thus, *Hurley* decided whether compelled participation in a privately organized event that would alter the message of the event violated the private organizer's *First Amendment* rights--not whether compelled attendance in a private event that does not impact the organizer's message violated the organizer's *First Amendment* protections.

Other courts have recognized this distinction in *Hurley.* For example, in *Sistrunk v. City of Strongsville, Ohio,* the court pointed out that the gay rights advocates in *Hurley* could have lined the streets of the parade as non-participants and still disseminated their message. *99 F.3d at 199 (6th Cir. 1997).* In *Sistrunk,* the issue was whether a Republican organization could exclude Democrats from a rally for a

Republican candidate that was held on public property. In denying the Democrats' challenge to the Republican policy, the court compared the rally attendees' participation in the event to marchers in the *Hurley* parade and noted, "participating in the rally [for a Republican candidate] as a member of the audience is more akin to marching in the parade itself . . . ." *Id. at 199.* Thus, the Democrats were denied entrance because their mere attendance and protest at the rally was tantamount to participating in the parade and that would have impeded the organizer's message.

The court in *Gathright v. City of Portland, Oregon,* also considered *Hurley* and applied the same distinction between participation and attendance. *315 F. Supp. 2d 1099 (D. Oregon 2004).* [14] In holding that *Hurley* did not apply to a private organization's attempt to keep out a proselytizer at a public event, the court stated:

> There is a distinction between participating in an event and being present at the same location. Merely being present at a public event does not make one part of the event organizer's message for *First Amendment* purposes . . . . there is an important constitutional difference between forcing a permittee to include a dissenter as a participant in a defined event where the public will reasonably conclude the dissenter's message is part of or sanctioned by the permittee, and excluding a dissenting speaker who is simply located at an event either to protest the permittee's message or to take advantage of a crowd to proselytize.

315 F. Supp. 2d at 1103. Noting that the private organizer's messages would have been diminished if plaintiffs had prevailed in *Hurley* and *Sistrunk*, the court further stated:

> In this case, there was no danger that any member of the public would attribute plaintiff's pietistic messages to the private organizers . . . Plaintiff's preaching was often unrelated to or directly contrary to the ideas being expressed at these events. Going to an event to preach and carry signs bearing a religious message is distinct from attempting to participate [in the event].

Id. at 1104. Because there was no chance that the attending public would attribute the plaintiff's message to the event organizer and the plaintiff's message was not consistent with the event organizer's, the court in *Gathright* held that the plaintiff was not seeking to participate in the event and *Hurley* did not control the outcome of the matter.

In the instant case, Plaintiffs are not seeking to participate in the Air Show. They have not requested access to the dais during the remembrance ceremony at the Air Show nor have they sought permission to run a booth on the tarmac. Instead, Plaintiffs want to stand on the tarmac and distribute leaflets and circulate petitions. Whether those leaflets support or oppose the Corporation's stated purpose is not for this Court to decide, particularly where such an interpretation is based on subjective beliefs. However, there can be no dispute that reasonable Air Show attendees would not associate or attribute Doyle's leaflets to the

Corporation, particularly where Doyle's leaflets may be perceived by some attendees as being contrary to the views of the Corporation.

Like the proselytizer in *Gathright*, Plaintiffs go to the Air Show to distribute leaflets and circulate petitions that cannot possibly be attributed to the Corporation or its message. Such conduct is the equivalent of attending the parade and not participating in it. Because Plaintiffs are merely attending the Air Show, *Hurley* would not apply to the instant dispute, even if the Court had not found that the Corporation was a private actor.

VI. Whether Proposed Conduct at Air Shows is Protected by *First Amendment*

The parties do not dispute that petitioning, leafleting and protesting are activities protected by the *First Amendment*. To some extent, all speech is protected by the *First Amendment*, except narrow categories that are deemed unworthy of the Amendment's full protection, such as obscenity and "fighting words." *Eichenlaub v. Township of Indiana, 385 F.3d 274, 282-83 (3rd Cir. 2004)* (citing *R.A. V. v. City of St. Paul, Minnesota, 505 U.S. 377, 382-90, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992))*.

In *Meyer v. Grant*, the Supreme Court stated the following when it invoked the *First Amendment* to strike down a Colorado statute that prohibited paying petition circulators:

> The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion

> of the merits of the proposed change. Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it. Thus, the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech."

486 U.S. 414, 421-22, 100 L. Ed. 2d 425, 108 S. Ct. 1886 (1988). Also see Bernbeck v. Moore, 126 F.3d 1114, 1117 (8th Cir. 1997) (relying on Meyer); *Chiu v. Plano Independent Sch. Dist., 339 F.3d 273, 280 (5th Cir. 2003)*; *Walker-Serrano ex rel. Walker v. Leonard, 325 F.3d 412, 418 (3rd Cir. 2003)* ("The petition creates an environment that encourages speech of a kind central to the *First Amendment's* concern.").

Just as circulating a petition is core political speech under the *First Amendment*, distributing leaflets and handouts is also core political speech because both forms of speech seek to influence public opinion. In *McIntyre v. Ohio Elections Comm'n*, the Supreme Court stated that "handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of *First Amendment* expression." *514 U.S. 334, 347, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995)* (citing *Int'l Soc. for*

Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)). In a subsequent opinion, the court reiterated, "Leafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the *First Amendment*," *Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 377, 137 L. Ed. 2d 1, 117 S. Ct. 855 (1997)*, and that the right to freedom of speech "embraces the right to distribute literature, and necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio, 319 U.S. 141, 143, 87 L. Ed. 1313, 63 S. Ct. 862 (1943)*. Similarly, the Supreme Court acknowledged the historical importance of leaflets when it wrote, "[Leaflets] have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." *Lovell v. City of Griffin, Georgia, 303 U.S. 444, 452, 82 L. Ed. 949, 58 S. Ct. 666 (1938)*.

VII. The Tarmac as a Forum for Free Speech Activities

Under *First Amendment* analysis, it is fundamental that the "existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educational Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)*. In *Perry*, the Supreme Court divided government-owned property into three categories: (1) traditional public fora; (2) designated public fora; and (3) non-public fora. The parties agree that the Air Show venue is not a traditional public forum. Plaintiffs contend it is a designated public forum and Defendants contend it is a nonpublic forum.

A. Designated Public Fora

A designated public fora is "public property where the government intentionally allows discourse." *Families Achieving Independence and Respect ("FAIR") v. Nebraska Dep't of Soc. Services, 111 F.3d 1408, 1418 (8th Cir. 1997).* Thus, a designated public fora is created when the government sets aside public property "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985);* O'Neill, *45 Loy. L. Rev. 411 at n.36.* Examples of designated public fora include university meeting facilities and municipal theaters. O'Neill, *45 Loy. L. Rev. at 420* (citations omitted).

The government does not designate public property as a forum for free speech activities by inaction or by allowing the public to visit the property. *Lee, 505 U.S. at 680; Cornelius; 473 U.S. at 802.* Instead, the decision to designate public property as a public forum must be made "by intentionally opening a nontraditional forum for public discourse." *Lee, 505 U.S. at 680* (quoting *Cornelius, 473 U.S. at 802*). To determine the governmental body's intent, courts often look to the body's policy and practice with respect to the property. O'Neill, *45 Loy. L. Rev. at 420* (citing *Cornelius, 473 U.S. at 802*).

In addition to the government's intent, courts also consider the location of the public property that was allegedly intended to be a designated public forum "because separation from acknowledged public areas may serve to indicate that the separated property is a

special enclave, subject to greater restriction" than a traditional public forum. *Lee, 505 U.S. at 680* (citing *United States v. Grace, 461 U.S. 171, 179-80, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983)).* The purpose of looking at the location of the property is to discern whether the property is by its nature "compatible with expressive activity." *Cornelius, 473 U.S. at 802.*

Thus, in evaluating whether the government has designated its property as a public forum, courts "will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will [courts] infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Id. at 803.*

If a governmental property is designated a public forum, then the government's restrictions on speech-related conduct must be "necessary to serve a compelling interest" and the regulation must be "narrowly drawn to achieve that end." *Perry, 460 U.S. at 45; also see FAIR, 111 F.3d at 1418* (citing *Perry, 460 U.S. at 46*).

B. Nonpublic Fora

Governmental property that is neither traditional public fora nor designated public fora is categorized as nonpublic fora. *FAIR, 111 F.3d at 1419* (citing *Lee, 505 U.S. at 678-79*) ("The third category of fora, the nonpublic forum, consists of all other public property."). When it comes to restricting free speech conduct on nonpublic fora, the government "enjoys 'maximum control over communicative behavior' because its role 'is most analogous to that of a private owner.'" O'Neill, *45 Loy. L. Rev. at 420* (quoting *Paulsen v. County of*

Nassau, 925 F.2d 65, 69 (2nd Cir. 1991)). The court in *Perry* described the government's role in restricting speech-related conduct on nonpublic fora as follows:

> The *First Amendment* does not guarantee access to property simply because it is owned or controlled by the government .... As we have stated on several occasions, the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Perry, 460 U.S. at 46. The Court in *Perry* stated the level of scrutiny for nonpublic fora speech restrictions as:

> In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Id.

C. Forum Analysis

The Court finds that the Air Show is a nonpublic forum. There is no evidence that the City has ever designated the Airport tarmac as a public forum. The tarmac is not open to any members of the public except for the two-day time period of the Air Show. Boston Dep. at 112: 1-20. During these two days of the Air

Show, the City allows pedestrians onto the tarmac, but allowing the public to freely enter onto the tarmac is not determinative of the issue; instead, the Court must consider whether the City "intentionally opened [the tarmac] for public discourse." *Lee, 505 U.S. at 680* (quoting *Cornelius, 473 U.S. at 802*). There is no evidence that the City has ever intentionally invited public discourse onto the tarmac, even during the two-day Air Show every May.

Because the tarmac qualifies as neither a traditional nor a designated public forum, it must by default be a nonpublic forum. *See FAIR, 111 F.3d at 1419* (citing *Lee, 505 U.S. at 678-79*) ("The third category of fora, the nonpublic forum, consists of all other public property."). This position is consistent with the Supreme Court's finding in *Lee* that a passenger airport terminal, which is analogous to the Air Show tarmac, was a nonpublic forum. *Lee, 505 U.S. at 683* ("Although many airports have expanded their function beyond merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities. Thus, we think that neither by tradition nor purpose can the terminals be described as satisfying the standards we have previously set out for identifying a public forum.").

The final question to be considered is whether leafleting, petitioning and protesting can be prohibited altogether because the Air Show is a nonpublic forum.

VIII. What Restrictions are Reasonable?

In *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, the Court considered whether a resolution restricting free speech in the airport was

constitutional. *482 U.S. 569, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987)*. The resolution at issue stated that the airport "is not open for *First Amendment* activities by any individual and/or entity." *Id. at 574*. Although the Court did not explicitly find that the airport was a nonpublic forum, it did hold that the resolution restricting speech in the airport was facially unreasonable, even if the airport was a nonpublic forum. *Id. at 573*. The Court noted that enforcing the resolution would prohibit "talking and reading, or the wearing of campaign buttons or symbolic clothing." *Id. at 574*. The Court also noted, "Much nondisruptive speech--such as the wearing of a T-shirt or button that contains a political message--may not be 'airport related' but is still protected speech even in a nonpublic forum." *Id. at 575* (citing *Cohen v. California, 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971)* (holding that wearing of jacket with offensive language in a courthouse was a form of nondisruptive expression that was protected by the *First Amendment*)). Thus, although specific conduct was not at issue in the *Jews for Jesus* decision, the Court nonetheless implicitly held that non-disruptive speech is protected by the *First Amendment* in nonpublic fora and that restrictions that encumber non-disruptive expression are unreasonable.

In her concurring opinion in *Int'l Society for Krishna Consciousness v. Lee*, Justice O'Connor set forth the test for determining reasonableness in the context of nonpublic fora. *505 U.S. 672, 687 (1992)*. She stated, "The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances. " *Id.* (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S.*

788, 809, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)). At issue in *Lee* was whether a religious sect could solicit for donations and distribute leaflets in an airport, which the Court held was a nonpublic forum. Justice O'Connor distinguished between solicitations and distributing leaflets when she wrote:

> [Leafleting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, 'one need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand . . . . The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'

Id. at 690 (quoting *United States v. Kokinda, 497 U.S. 720, 734, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990))*. Thus, the Court held in *Lee* that prohibiting solicitation in a nonpublic fora is not unreasonable, but that prohibiting the distribution of leaflets and other literature is unreasonable.

Circuit courts have also recognized the inherent right to distribute paper and other information in nonpublic fora. In *Jacobsen v. City of Rapid City, South Dakota* and *Multimedia Publishing Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist.*, two circuit courts have held that airports, as nonpublic fora, could not preclude newspaper publishers from placing newsracks in airport terminals. *See Jacobsen v. City of Rapid City, South Dakota, 128 F.3d 660 (8th*

Cir. 1997); *Multimedia Publishing Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993)*. To the extent that the airports were concerned about safety or the impediment of traffic flow, the courts held that the airport may impose reasonable restrictions, but they could not enforce an outright ban on the newspaper racks.

The Corporation has banned leafleting, petitions and protests. It is clear from *Lee* that the Defendants can ban all petitioning from the Air Show tarmac. It is equally clear from *Lee* and *Jews for Jesus* that the Defendants cannot ban all leafleting and "protest." However, leafleting and protest are subject to reasonable time, place, and manner restrictions so the Court will address each of the articulated justifications for the Corporation's ban on leafleting and protest, which are:

1. Interference with the public's enjoyment of the Air Show;

2. Litter;

3. These activities are not appropriate;

4. The activities interfere with the Corporation's *First Amendment* rights;

5. The Plaintiffs have alternative places to speak; and

6. The size of the crowd will increase

As to number one, the Corporation's concern that leaflets will interfere with the public's enjoyment of the Air Show is undermined by the fact that programs are being handed out and there are so many distracting

activities on the tarmac that leaflets are unlikely to have any measurable impact on the ability of the public to see the aerial displays. Martin testified that at the Air Show convention he attends, the organizers are taught how to handle *First Amendment* activities, suggesting that these concerns have been adequately addressed elsewhere.

As to number two, the Defendants' litter argument is without merit, given the amount of paper products being distributed by the Corporation and its exhibitors and the precautions that have already been taken to deal with trash. There is no greater danger from leaflets than programs and hamburger wrappers. There is no evidence in fifteen years of this Air Show that there has been a safety problem associated with trash.

As to number three, the Corporation's argument that leafleting is not appropriate for the event, is an insufficient justification to ban all leafleting. The Corporation does not define what is appropriate or why leafleting is inappropriate, so it is difficult to identify their precise objection. The example that the Corporation's counsel used during oral argument suggests that family members would be upset by antiwar sentiments expressed during the Noon time memorial to honor fallen soldiers. The Court agrees that it would be inappropriate to detract from any program which honors the sacrifices of the men and women of the armed services. Defendants have a right to exclude all activity and speech during such a memorial, so long as the rules are uniformly enforced to preserve the solemnity of the occasion. However, as to the entertainment component of the Air Show, the Defendants cannot exclude all speech activities merely by claiming that the entire event is to honor and

remember veterans so no other message is permissible. This is content and viewpoint discrimination and therefore impermissible, especially in light of the Corporation's advertising policy that allows commercial advertising even where the advertising does not promote the Corporation's stated goals of honoring and remembering veterans. The Air Show is a substantial asset to the community and the City and the Corporation should be recognized for what they have jointly accomplished, but words will not transform an entertaining Air Show with all the accouterments of a festival into a solemn occasion.

In *DeBoer v. Village of Oak Park, 267 F.3d 558 (7th Cir. 2001)*, the Seventh Circuit illustrated how government impermissibly excludes speech from a nonpublic forum by definitional limitations. There, the Seventh Circuit held that the Village of Oak Park could not prevent a church from meeting in a public building to pray for governmental officials merely because the church would not "accommodate various view points on the civic topic." *DeBoer, at 571.* The Village had argued that it only permitted groups which were presenting a civic program, and a church event involving prayer did not focus on citizens and their relationship with government. The Seventh Circuit held that a prayer service in support of government could be a civic event. "In adopting the philosophical and theological position that prayer, the singing of hymns and the use of Bible commentary can never be 'civic,' the Village has discriminated against the speech of those of its citizens who utilize the forms of expression to convey their point of view on matters relating to government." *Id. at 568.*

As to number four, the Court has previously held that the Corporation's *First Amendment* rights will not be violated just because the public is permitted to engage in reasonable speech activities on the tarmac. However, the Corporation does retain complete control over who participates in the Air Show, occupies a booth or has a display on the tarmac. A reasonable person might assume that a participant in the Air Show "speaks" for the organizers.

As to number five, Defendants' argument that the Plaintiffs have an alternative place to speak, the Court has found no case which has held that forbidding all speech at a nonpublic forum is a reasonable restriction. By definition, the requirement that the limitations on speech at a nonpublic forum must be reasonable suggests that keeping all speech out of the forum is not an alternative. The only context where the availability of alternative fora is relevant is where the forum at issue is a traditional public forum--not a nonpublic forum and in such a case an alternative forum is just one requirement that must be met. *See Perry, 460 U.S. at 45* (stating that in a traditional public forum, the "state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication"). If the Supreme Court had intended to permit a state actor to forbid all speech at a nonpublic forum because there were alternative channels for expression, it would have said that the nonpublic forum restrictions must *either* be reasonable or there must be an alternative place for expression. The fact that the Plaintiffs can distribute leaflets elsewhere in the

Airport property is not a reasonable time, place or manner restriction.

As to number six, the Corporation's concern about the size of the crowd is not supported by the record. While many groups have sought to have a booth or display at the Air Show, the record does not show that many people have expressed an interest in leafleting. More importantly, this justification seems inconsistent with the Corporation's obvious effort to increase attendance and their pride at having increased attendance at the special Noon-time memorial to veterans. Logistical problems that actually arise because of leafleting crowds, if any, can be addressed with reasonable time, place and manner restrictions.

Finally, any other time, place and manner restrictions imposed by the Defendants must be content and viewpoint neutral and must be uniformly enforced. In the past, the rules have not always been uniformly enforced. Doyle was permitted to enter the event with a sign which said "God Bless Our Troops" and moved freely about the event for an hour and a half. Steve Jacobs could not even enter the tarmac because he carried a sign that said "God is Watching."

The Corporation's potential for viewpoint discrimination is particularly troubling because it has an unwritten rule banning all "protestors." Under the overbreadth doctrine, a regulation may be declared invalid on its face if its overbreadth is "substantial." *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574, 96 L. Ed. 2d 500, 107 S. Ct. 2568 (1987)* (citations omitted). To be overbroad, "there must be a realistic danger that the [regulation] itself will significantly compromise

recognized *First Amendment* protections of parties not before the Court . . ." *Id.* (quoting *City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984)). See also Van Bergen v. State of Minnesota, 59 F.3d 1541, 1549 (8th Cir. 1995)* (applying the same standard to overbroad challenges to *First Amendment* restrictions). In *Jews for Jesus,* the Supreme Court determined that a total ban on *First Amendment* activities inside an airport terminal was facially overbroad because it would prohibit things like "political buttons or symbolic clothing." *Id. at 574.* "Much nondisruptive speech--such as wearing a T-shirt or button that contains a political message--may not be 'airport related' but is still protected speech even in a nonpublic forum." *Id.*

Similarly, a court may invalidate a *First Amendment* restriction where it is unduly vague. The vagueness doctrine incorporates two basic considerations: (1) concerns about fair notice of what is acceptable conduct under the restriction, and (2) concerns about excessive discretion being invested in administering and enforcing officials. *Ridley v. Massachusetts Bay Transp. Auth., 390 F.3d 65, 93 (1st Cir. 2004)* (applying vagueness doctrine to nonpublic forum) (citing *Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)).* Courts impose increased vagueness scrutiny on regulations that impose criminal sanctions for participating in the prohibited protected activities. *Id.*

It is apparent at a minimum that the Defendants cannot exclude clothing, buttons or hats because they contain language which the Defendants interpret as protest.

IX. Injunction Bond

Under *Fed. R. Civ. P. 65(c)*, this Court is required to impose an injunction bond. *Fed. R. Civ. P. 65(c)*. In their brief, Plaintiffs aver that they do not have sufficient means to post an injunction bond in this case and Defendants do not contest Plaintiffs' claim that they have limited means. Nonetheless, *Rule 65(c)* mandates an injunction bond. Because neither party in this case will suffer monetary hardship by the issuance of the preliminary injunction and because the matter involves constitutional violations, the Court finds that a nominal injunction bond of $ 500 is appropriate.

X. Conclusion

Plaintiffs have asked for two specific things-to distribute leaflets and to seek signatures on petitions. The Supreme Court has given good guidance on both these issues in *International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 689-93 (1992)*. In that case, the Supreme Court held that the owner of an airport could not prevent leaflets from being distributed in the airport terminal. "We have expressly noted that leafleting does not entail the same kinds of problems presented at face to face solicitations." Because leaflets could be taken mechanically and read at a later time, they were minimally intrusive and could not be banned altogether from the terminals. There was no pressure on the individual to stop and talk. Petitions are another thing. The Supreme Court, in *Krishna*, held that solicitations for money could be banned in the airport terminal because they were intrusive and were likely to demand a contemporaneous response from passengers on their way to a plane. Petitions are analogous to solicitations because the public must first

read the petition before deciding to sign. A similar approach was taken by Judge Posner in *Chicago Acorn v. Metropolitan Pier, 150 F.3d 695 (7th Cir. 1998)*, where he held that leafleting could not be forbidden at a publicly owned entertainment venue even though it was being rented to the Democratic Party for one dollar.

The Court concludes that Plaintiffs can distribute leaflets at the 2005 Air Show, but they may not circulate petitions for signatures. The Court understands that the average citizen may not appreciate the fine distinction crafted by the Supreme Court, but this Court is obligated to follow precedent and clear precedent is particularly appreciated.

Finally, any restrictions on expression at the Air Show must be content and viewpoint neutral and not violate the overbreadth and vagueness doctrines. Therefore, expressive clothing, hats, and buttons cannot be banned as "protest" because they express a viewpoint disfavored by the Defendants.

Accordingly, it is hereby

ORDERED that Plaintiffs' Motion for Preliminary Injunction [Doc. # 54] is GRANTED in part and DENIED in part as follows:

(1) Plaintiffs and similarly situated individuals may distribute leaflets at the Air Show subject to the permissible restrictions identified in this Order,

(2) Plaintiffs and similarly situated individuals may not circulate petitions or engage in any other form of soliciting at the Air Show;

(3) Defendants may not forbid all expressive clothing, hats, and buttons because they express a viewpoint disfavored by the Defendants; and

(4) Plaintiffs must submit an injunction bond in the amount of $ 500, pursuant to *Fed. R. Civ. P. 65(c)*, within seven (7) days of the date of this Order.

NANETTE K. LAUGHREY

United States District Judge

DATE: May 18, 2005

Jefferson City, Missouri

Footnotes

1 After learning of this Ordinance in the Plaintiff's opening brief, the City introduced an ordinance to change its law on this subject.

2 The publicly owned planes are provided without charge. However, the Corporation must pay the travel expenses of the personnel who handle the planes.

3 This assumes that a city issues permits without regard to the viewpoint of the group seeking to use the public land.

4 These restrictions must be content neutral and uniformly enforced.

5 Mr. William Boston is the manager of the Airport. Boston Dep. at 6:10-11.

6 Race and speech-related exchange between Plaintiffs' counsel and Martin. *See* Martin Dep. 68:11 to 69:1-6.

7 Posner testified that the civic organization staffing the booth gets ten percent of the gross sales while the Corporation gets thirty percent of the gross sales, with the remaining sixty percent going to the producer of the good being sold. Posner Dep. 98:3-9.

8 Plaintiffs cited to Martin's deposition testimony in support of their contention. However, Martin testified that he could not say whether the recruiters were distributing materials or carrying clipboards. Martin Dep. 92:11 to 93:5.

9 Defendants' Exhibit 120 is actually a replica of the larger posters. It is a scaled down model. Posner Dep. at 266:17-22.

10 The City police officer in charge of security at the Air Show testified, "if [Posner] says that she does not want somebody on her property, regardless of what her reasoning is, I would ask that person to leave." Martin Dep. 67:24 to 65:2.

11 Her power is so absolute that the police would exclude someone because of their race if they were told to do so by Posner. *See* Martin Dep. 68:11 to 69:6. While there is no evidence that the City, the Corporation or Posner has ever excluded anyone from the Air Show based on race or any protected status other than speech, the willingness of the police to take this extreme action illustrates the expansive delegation of authority given to Posner.

12 At this stage of the proceeding, the Court understands this area to be the outlined portion of the Airport identified as "Crowd Area Static Display" that is depicted in in Pl. Ex. 22 at Bates No. 00370. The Court assumes that all other areas of the Airport remain in the control of the City.

13 The City also provides other minor benefits to the Corporation.

14 The opinion cited herein from the *Gathright* court was issued after the Court of Appeals had already affirmed the district court's preliminary finding that Portland's conduct violated the plaintiffs' free speech rights. *See 74 Fed. Appx. 810.* Thus, the only issue before the court in the order cited herein was whether plaintiffs were entitled to a permanent injunction. The court found that they were. *315 F. Supp. 2d at 1105.*

5/8/2007

No. 06-1922

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Bill Wickersham; Maureen Doyle,
Plaintiffs/Appellees,

v.

City of Columbia,
Defendant,

Memorial Day Weekend Salute
to Veterans Corporation,
Defendant/Appellant.

Appeal from U.S. District Court for the Western
District of Missouri - Jefferson City
(2:05-cv-04061-NKL)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. May 08, 2007 Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Supreme Court, U.S.
FILED
AUG 6 - 2007
OFFICE OF THE CLERK

No. 07-142

IN THE

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE
TO VETERANS CORPORATION, PETITIONER

v.

BILL WICKERSHAM; MAUREEN DOYLE

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(3)

No. 07-142

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE
TO VETERANS CORPORATION,

Petitioner,

v.

BILL WICKERSHAM AND MAUREEN DOYLE,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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Respondents Bill Wickersham and Maureen Doyle submit this brief in opposition to the petition for certiorari filed by Memorial Day Salute to Veterans Corporation.

STATEMENT

At its base, this case involves the liability of a private event organizer for restricting the protected speech activities of air show attendees in the face of extensive entwinement with a public entity, and whether an organizer so situated may invoke its own First Amendment rights to prohibit all unwanted attendee speech. Neither of these issues is appropriate for this Court's consideration because the holdings do not conflict with any decisions of this Court or of the United States Courts of Appeal and are dependent upon a fact intensive inquiry.

On the state action question, the Eighth Circuit relied upon this Court's reasoning in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) to govern its inquiry: "The key issue is whether Salute may appropriately be considered a state actor in the circumstances presented." App. 11a. Regarding Salute's First Amendment defense, the Eighth Circuit framed the issue as whether Salute's speech includes those in attendance and, if not, whether attendee speech otherwise affects Salute's message. App. 17a.

Petitioner Salute's stated issues in support of its petition for writ of certiorari are two-fold: 1) that the Eighth Circuit's answer to the state action question is in conflict with decisions of the Fourth and Sixth Circuits and 2) that the court below incorrectly concluded that the First Amendment did not protect Salute from the speech of attendees at this public event. These issues arise in the

following context, which is not fully presented in the petition for certiorari.

Salute has held an air show at the City of Columbia's public airport since 1993. Pet. App. 2a. For this two day event, the City executes a contract which provides Salute exclusive control over the airport's tarmac during the air show without charge and with the proviso that the City may regain control in emergency situations. Pet. App. 2a and 3a. The City executed this contract despite an ordinance, repealed in 2005 after this litigation ensued, which provided that the city could not enter into leases or contracts which impaired its control of the airport. Pet. App. 3a.

Each year tens of thousands of people attend the air show which is free and open to the public. Pet. App. 2a. At all other times, the general public does not have access to the tarmac. Pet. App. 3a. The air show is "fair like and generally open . . ." and includes the expected aerial acrobatics by military planes as well as various entertainment activities on the secured tarmac, including food and souvenir booths, static displays of aircraft and antique automobiles, outside advertisements honoring the military or promoting commercial ends and military recruiters as well as exhibits such as a climbing wall, adventure van, obstacle course and shooting gallery. Pet. App. 2a, 24a and 63a. The 2005 air show also included a toy police car with a robot driver and a radio station van broadcasting from the tarmac. Pet. App. 24a. At noontime each day of the event, there is a ceremony to honor fallen veterans. Pet. App. 3a.

The air show cannot occur without extensive and close cooperation between Salute and the City. Salute decides

the content of the air show, including the schedule of events, guests to be honored and exhibits. Pet. App. 3a. The City is responsible for operating the airport during the air show and coordinating with the Federal Aviation Administration to ensure the air show's compliance with federal regulations and has primary responsibility for the "Ground Operations Plan." Pet. App. 3a and 4a. This support, according to Salute, is "absolutely essential" to the air show's success. Pet. App. 3a. In addition, city officials participate in meetings to prepare for the air show throughout the year. Pet. App. 4a and 69a. All of this City involvement, as well as other non-traditional services, such as the City's arranging public transportation to and from the air show, are at no cost to Salute. Pet. App. 4a and 69a.

As a condition for Salute's access to military planes for the air show, both Salute and the City are required to sign an application to the Department of Defense representing that the event is "officially supported by local government" and open to the public. Pet. App. 4a. While Salute provides a disclaimer in media releases that the City does not sponsor the air show and the air show contract provides that Salute and the City are not partners, the City advertises the air show on its website under the titles "Guide to City Services" and "Public Works Provided for Residents and Businesses." Pet. App. 4a. In addition, City officials described the City airport's part in the air show as a "community partner" and "host." Pet. App. 69a.

Salute devised various conduct rules applicable to attendees at the air show, including "prohibitions against soliciting, petitioning, leafleting, political campaigning, and 'unauthorized signs.'" Pet. App. 4a-5a. City police (identifiable by their badges) provide security at the air

show, at the City's expense, and develop a security plan that specifically incorporates all of Salute's speech restrictions.[1] Pet. App. 5a. The City enforced these restrictions due to its contract with Salute and Salute's president testified that the police enforced the restrictions "'on [Salute's] behalf.'" Pet. App. 7a.

Until the District Court's 2005 preliminary injunction order, the security plan generally provided something to the following effect: "no protests are permitted inside the tarmac fence." Pet. App. 5a and 20a, n.3. Although Salute did not develop the security plan, Salute provided the City instruction as to prohibited activities. Pet. App. 5a. Consistent with these instructions, in 2003 the City circulated a memo to its police officers which provided the following:

> Protestors are likely at the show. . . . Should protesters attempt to enter the premises, officers will immediately advise the Command Center and will stop their forward progress. Officers will advise them of the area being private property and of the restrictions related to carrying signs, seeking signatures to petitions, or demonstrating. Any person who persists in entering will be

[1] Captain Martin was unaware of City police ever being called upon to enforce a private organization's speech restrictions at any event other than the air show. Pet. App. 5a-6a. Nor is First Amendment protected activity intrinsically inconsistent with an air show as Salute suggests at various points in its petition. In fact, as part of his air show duties, Captain Martin annually attends the International Convention of Air Shows where he receives training in protecting the free speech rights of attendees while maintaining security at air shows. Pet. App. at 71a; Martin Dep. at 19-21. That air shows and attendee exercise of First Amendment activities are compatible is further evidenced by the fact that at the 2005 air show some attendees engaged in the First Amendment activities allowed by the district court's injunction without disrupting it. Pet. App. 25a.

> given a trespass warning prior to arrest. Keep in mind that persons are not restricted from entering, only those who intend to conduct a protest once entry is made.

Pet. App. 5a. Captain Martin, who coordinated the air show's security force, testified that Salute's president "was the final arbiter of what constituted unwanted protest at the event." Pet. App. 5a-6a. In fact, if Salute requested it, the City police would go so far as to remove someone on account of his race. Pet. App. 6a.

It was the application of these rules at the 2004 air show that led to the current litigation. A City police officer confronted Respondent Maureen Doyle after he observed her distributing anti-war fliers on the secured tarmac. An officer confiscated her fliers and she was threatened with arrest if she continued. Pet. App. 6a. Likewise, a City police officer approached and then detained Respondent Bill Wickersham on the secured tarmac when he refused to stop collecting signatures on a renewable energy petition. Pet. App. 6a. After consulting with Salute's President and at her direction, the officer arrested Mr. Wickersham and issued him a ticket for trespassing. Pet. App. 6a.

Based upon these and other facts, the district court issued a preliminary injunction finding that Salute and the City acted under color of state law in prohibiting certain speech activities and ordering that they permit the public to distribute leaflets and wear expressive clothing at the 2005 air show, but prohibiting the circulation of petitions or other types of solicitation. Pet. App. 7a. Later, as part of its order for a permanent injunction, the district court expanded the list of permissible activities to include the carrying of signs and recognized that Salute could

restrict all attendee expressive activities during the solemn noontime ceremony. Pet. App. 9a.

Following the preliminary injunction, Salute disavowed by letter its role in directing the City police. Pet. App. 7a. Nonetheless, the security operation at the 2005 air show did not change except the police enforced Salute's restrictions on speech subject to the district court's order. Pet. App. 8a. Although no one attempted to circulate a petition, Captain Martin testified "that he would have stopped anyone who did, not because such activity violated a city ordinance, but because Salute disapproved it and it was not protected by the preliminary injunction." Pet. App. 8a.

Although, as Salute notes in its petition (p. 8), a few 2005 air show attendees filled out comment cards complaining about the presence of "protestors," there was no evidence that the few individuals who engaged in leafleting and carried signs at the air show caused any disruption. Pet. App. 8a.

Salute, but not the City, appealed the district court's entry of a permanent injunction, challenging the court's finding that it acted under color of state law and that allowing attendee speech did not infringe its First Amendment rights. The Eighth Circuit rejected Salute's arguments on both issues, relying primarily on undisputed facts.

The Eighth Circuit addressed Salute's claim that it did not act under color of state law using this Court's fact-intensive analysis for imposing state actor status upon a private entity, as set forth in *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288 (2001), *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982) and *Burton v.*

Wilmington Parking Auth., 365 U.S. 715 (1961). Pet. App. 10a-12a.

The court found: "the city's role was far more than 'mere acquiescence,' for the city not only provided critical assistance in planning and operating the show, but also played an active role in enforcing the particular speech restrictions challenged in this action." Pet. App. 12a-13a. Based upon these facts, the Eighth Circuit readily distinguished *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000) and *UAW, Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995), stating "[t]he direct role of the Columbia police in enforcing Salute's speech restrictions provided the critical nexus, absent in other cases, between the challenged conduct and the exercise of state authority." Pet. App. 13a. While recognizing that mere invocation of police assistance does not make a private party a state actor, the Eighth Circuit held that the facts demonstrated that "[t]he city's cooperation with Salute was directed toward effectuating the challenged policy rather than merely keeping the peace." Pet. App. 13a-14a.

The Eighth Circuit next considered Salute's claim that it had a First Amendment right to exclude the unwanted speech under *Hurley v. Irish American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). Unlike *Hurley*, where the evidence established that the content of the parade, including its participants, constituted the organizer's speech, the Eighth Circuit found that Salute's evidence fell short because it failed to show that "its message was dependent upon the composition of the crowd at the air show." Pet. App. 17a.

The court separately found that there was no evidence that the presence of air show attendees engaging in

nondisruptive speech activities affected Salute's "ability to deliver its chosen message." Pet. App. 17a. Nor did the Eighth Circuit find any evidence that the spectator speech at issue would be identified as Salute's speech, relying on *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980) and *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297 (2006) ("*FAIR*"). Pet. App. 17a-18a. Instead, the court found that the evidence supported the contrary, given complaints by some attendees about "the presence of 'protestors' at the event . . . " Pet. App. 18a.

ARGUMENT

The Eighth Circuit's decision soundly applies the principles of this Court's state action decisions in *Brentwood*, 531 U.S. 288, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *Lugar*, 457 U.S. 922 and *Burton*, 365 U.S. 715, and First Amendment decisions in *FAIR*, 547 U.S. 47, 126 S. Ct. 1297, *Hurley*, 515 U.S. 557 and *PruneYard*, 447 U.S. 74, to the specific fact situation presented here. The decision below is, moreover, precisely in line with analogous First, Seventh and Ninth Circuit state action opinions in *D'Amario v. Providence Civic Center Auth.*, 783 F.2d 1 (1st Cir. 1986), *Air Line Pilots Assoc. v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995), *Lee v. Katz*, 276 F.2d 550 (9th Cir. 2002), *cert. denied*, 536 U.S. 905 (2002), *ACLU v. City of Las Vegas*, 333 F.3d 1092 (9th Cir. 2003), *cert. denied*, 540 U.S. 1110 (2004) and *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983); and the Sixth, Ninth and D.C. Circuits' First Amendment decisions in *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005), *Gathright v. City of Portland, et al.*, 439 F.3d 573 (9th Cir.

2006) and *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997). Contrary to Salute's assertions in the certiorari petition, the Eighth Circuit's decision is not in conflict with the decisions of the Fourth and Sixth Circuits nor is it in tension with any decision of this Court. The petition should, therefore, be denied.

I. The Eighth Circuit's state action holding does not merit a writ of certiorari because it involves a fact-specific application of this Court's decisions and does not conflict with the Fourth Circuit's decision in *Lansing* nor the Sixth Circuit's decision in *Gaston*.

Following this Court's state action precedent, the Eighth Circuit held Salute liable as a state actor upon determining that it engaged in conduct "fairly attributable" to the state. Pet. App. 10a, *quoting*, *Lugar*, 457 U.S. at 937. In so finding, the court recognized that under this Court's precedent its "ultimate conclusion must turn on the particular facts of the case, since 'only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.'" Pet. App. 11a, *quoting*, *Burton*, 365 U.S. at 722. The Eighth Circuit also undertook the proper analysis in finding "fairly attributable" conduct, following this Court's requirement that the alleged deprivation "resulted from the exercise of a right or privilege having its source in state authority" and that the party participating in the deprivation is "appropriately characterized as [a] state actor[ ]" Pet. App. 10a, *quoting*, *Lugar*, 457 U.S. at 939.

Applying these same principles, this Court has found various private entities liable as state actors. For instance, in *Edmonson*, this Court held that a private company

engaged in state action by using peremptory challenges to exclude African-Americans from a jury in a civil action. 500 U.S. at 632. This Court reasoned: "Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Id.* at 620. Additionally, in *Brentwood*, this Court held that a statewide private athletic association (that had both public school and private school members) was liable as a state actor due to "the pervasive entwinement of state schools officials in the structure of the association . . . " 531 U.S. at 291. Similarly, in *Burton*, this Court held both the city and restaurant liable as state actors in refusing to serve a patron based upon his race, noting the symbiotic relationship between the city and private entity in operating the restaurant. 365 U.S. 715. Likewise, in *Lugar*, this Court held that a private business is liable under Section 1983 when using state statutory procedures to collect a debt because making use of a "procedural scheme created by the statute obviously is the product of state action" and the private entity engaged in joint participation with the state because it "invok[ed] the aid of state officials to take advantage of state-created attachment procedures." 457 U.S. at 941.

Before this Court are numerous factors supporting the Eighth Circuit's decision that Salute, too, was a state actor. As set forth above, these factors, which should not be considered separately as Salute suggests at page twelve of its petition, include Salute's dependence on governmental assistance in holding the Air Show, its control over the police and permitted activities on public property, the vast

entwinement between Salute and the City in hosting the Air Show, and most importantly the close nexus between Salute and the City in preventing First Amendment activity on the tarmac, including their joint action and the City's direct approval of Salute's conduct.

Salute's sole contention in support of certiorari review on this issue is that the Eighth Circuit's decision conflicts with the decisions of the Sixth Circuit in *Lansing*, 202 F.3d 821 and the Fourth Circuit in *Gaston*, 43 F.3d 902. In so arguing, Salute ignores the factual distinctions between these cases and the instant one – distinctions which, under this Court's precedent, make a private actor liable as a state actor under Section 1983. As the Eighth Circuit's factual findings reflect, Salute did much more than avail itself of traditional municipal services, including police services. Instead, Salute partnered with the City to co-produce the Air Show, and directed City personnel to effectively prohibit disfavored First Amendment activity at the Air Show. The latter occurred even though those exercising their rights were not in violation of any laws and their presence at the air show was consistent with Salute's and the City's obligation under its agreement with the military to make the air show free and open to the public. By its extensive entwinement with the City, Salute distinguished itself from the private entities at issue in *Lansing* and *Gaston*, and transformed itself into a state actor.

The plaintiff in *Lansing* attempted to preach in an area open to the public without charge and *outside* the event, but police officers directed him to move at the

private entity's request.[2] 202 F.3d at 825-26. Unlike Salute, the private entity in *Lansing* ran the event, provided its own security and required the public to pay admission. *Id.* at 825.

The *Lansing* court first held that the private entity was not a state actor under the exclusive state function test because the city had not ceded control over the areas surrounding the fair, where the plaintiff's speech activities took place. *Id.* at 828-29. In contrast, Salute directed the City's police on the City's property, which the City temporarily gave to it for an air show that required the City's extensive and continued involvement. Pet. App. 89a. Indeed, the Sixth Circuit later noted this distinction in *Parks*, 395 F.3d 643, where it held a city liable under facts similar to those in *Lansing*. In reconciling *Lansing*, the court noted that if the private entity has exclusive control over the public property that would "shift potential liability from the government to the private entity that functions as a state actor." *Parks*, 395 F.3d at 652, n.8 (citation omitted). *See also*, *Lee*, 276 F.2d at 556 (in attributing state actor status to private entity, court noted that *Lansing* did not apply because the city "retained little, if any, power over the [private entity's] free speech policies governing the commons.").

In addition, the *Lansing* court found insufficient evidence to meet the nexus test. 202 F.3d at 830. As the Eighth Circuit recognized, "[t]he active and prearranged role of the police in effectuating the event's private speech policies also sets this case apart from *Lansing* . . . [where]

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[2] Like the present case, the city in *Lansing* did not appeal the judgment finding it liable under 42 U.S.C. § 1983.

the City of Memphis had made no attempt to instruct its officers on how to police unwanted speech activities on festival grounds." Pet. App. 13a. Although the plaintiff did not meet the "nexus test" in *Lansing*, the Eighth Circuit correctly found it applied here, where "the police department's security plan instructed the officers to enforce Salute's rules rather than city ordinances, and the police took an active role in identifying and intercepting protesters at the air show, including Wickersham and Doyle." Pet. App. 14a. As a result, unlike *Lansing*, Salute did not merely request that the police eject Plaintiffs, but had the authority to direct the police to do so.[3] Further, as the Eighth Circuit and the district court summarized, the City's involvement in the Air Show and in restricting First Amendment speech based upon Salute's orders went far beyond what existed in *Lansing*. Pet. App. 13a-15a and 89a-90a.

Likewise, there is no conflict between the Eighth Circuit's decision in this case and the Fourth Circuit's opinion in *Gaston*, 43 F.3d 902. The *Gaston* court held that a private entity which organized an annual festival was not a state actor. *Id.* at 902. The group held the festival on public streets and sidewalks (under a permit) and on private property. *Id.* at 904-05. Although the city provided police protection, traffic assistance and sanitation services,

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[3] Nor does the record support that air show attendees who engage in speech activities lose their right to attend as Salute contends in its petition. As a condition of obtaining the military aircraft, personnel and equipment for the air show, Salute and the City guarantee that the air show is "open to the public." Pet. App. 4a. Attendees are not, therefore mere invitees as Salute claims. They are entitled to be on the premises as a condition of the federal government supplying the foregoing – without which there would be no air show.

in all other respects it was independent of the city and the city played no role in planning or managing the festival. *Id.* At issue was the private entity's failure to provide the UAW leased booth space because the union's intended message was outside the festival's purpose. *Id.* at 905. Here, Plaintiff's have not requested booth space, to fly in the air show or to participate in the noon time services.

The most glaring distinction between the present case and *Gaston* is that the plaintiff in that case *conceded* the absence of a nexus between the private organizer and the city. Pet. App. at 13a, *citing*, *Gaston*, 43 F.3d at 909 n.4. In addition, the *Gaston* court did not address the entanglement issue and distinguished this Court's decision in *Evans v. Newton*, 382 U.S. 296 (1966) on the basis that the city in *Newton* continued to be involved in the park even after it relinquished ownership. *Gaston*, 43 F.3d at 908. Like *Newton*, the City here continued to be intimately involved in the air show and Salute, and in particular the speech prohibitions that led to the finding of a constitutional violation, after supposedly temporarily relinquishing ownership of the secured tarmac.

As Salute recognizes in its petition, the *Gaston* court instead applied the traditional and exclusive government function test to the facts of that case. The Eighth Circuit plainly did not find that Salute was a state actor because it was performing a traditional and exclusive government function. Instead, its decision repeatedly refers to the entanglement and close nexus between the City and Salute. It found that Salute did not merely act with the City's acquiescence but with significant aid from City officials through, among other things, its police officer's direct enforcement of Salute's private speech restrictions. The fact that the Eighth Circuit and the *Gaston* court did

not rely on the same test to examine the presence of state action is another reason there can be no conflict between these two cases.

Moreover, regardless of the test applied, the state action analysis is fact intensive and the facts in *Gaston* are vastly different from the present case. Although police provided protection services at the fair in *Gaston*, there was no evidence of a nexus between the private entity and police officers in enforcing the private entity's booth policy. In contrast, as the Eighth Circuit found, the evidence in this case established that "Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions . . . "[4] Pet. App. 15a. Therefore, unlike *Gaston*, the Eighth Circuit's unchallenged factual findings were that Salute was not merely relying on public services but instead using City police as its own private security force, going "beyond the kind of neutral assistance that would normally be offered private citizens in enforcing the law of trespass." Pet. App. 14a.

Contrary to Salute's argument, due to the close nexus between the City and Salute in enforcing the speech restrictions, as well as their significant entwinement in producing the air show, the *Gaston* court's stated concern that imposing state actor status in that case would interfere with other private events on public property, such as a softball league, family barbecue, or wedding (43 F.3d at 911), is inapplicable here. The Eighth Circuit correctly found that this was not in fact your average private event,

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[4] In fact, the City formulated and enforced an air show security plan based totally on Salute's rules as to what speech it chose to prohibit even though the speech did not violate any local, state or federal laws. Pet. App. 5a and 14a.

but one fraught with a sufficient nexus and entwinement between private and city officials to impose state actor status.

Finally, the Eighth Circuit's opinion is consistent with other circuit court decisions imposing state actor status on private entities. These cases include: *D'Amario*,783 F.2d at 2-3, where the First Circuit held that a private event organizer was a state actor where state personnel were wholly responsible for the enforcement of the organizer's speech restrictions; *Air Line Pilots*, 45 F.3d at 1149-50, where the Seventh Circuit found that a private entity, though ultimately responsible for barring the union's advertisement, was a state actor because the city continued to have discretion in accepting or rejecting advertisements and due to the symbiotic relationship between the two entities; *Lee*, 276 F.2d at 554, where the Ninth Circuit held that a private entity was a state actor where it held a long-term lease to control public property because it developed policies regarding speech that were not subject to comment or approval by government; *ACLU*, 333 F.3d at 1098, where the Ninth Circuit held that the private manager of a city-owned street mall, as well as the city, engaged in state action in barring leafleting and unauthorized vendors from the mall due to its "pervasive entanglement with the City of Las Vegas and performance of an exclusively and traditionally public function"; and *Howerton*, 708 F.2d at 385, where the Ninth Circuit found that the active and ongoing police involvement in ejecting a tenant made the landlord a state actor.

In conclusion, the panel decision does not conflict with Fourth and Sixth Circuit precedent, Salute's only stated basis for certiorari review of the Eighth Circuit's state action holding.

II. The Eighth Circuit's holding that Salute's First Amendment rights were not violated does not merit a writ of certiorari because it is fact-specific and does not conflict with *Hurley*, nor is *Hurley* even implicated.

The Eighth Circuit's decision is consistent with this Court's decisions, including *Hurley*, 515 U.S. 557, *Prune-Yard*, 447 U.S. 74 and *FAIR*, 547 U.S. 47, 126 S. Ct. 1297, in finding that Salute did not have a First Amendment right to preclude attendees at this public air show from engaging in non-disruptive speech that does not alter or otherwise become part of Salute's official message. In so holding, the court recognized that under *Hurley*, "the state cannot compel a private entity to disseminate particular views or to alter its message to suit the government."[5] Pet at 16a. Relying on the facts before it, the Eighth Circuit held, however, that the plaintiffs' exercise of their First Amendment rights pursuant to the terms of the district court's order would do neither. Pet. App. 17a-18a. Therefore, Salute failed to meet its burden of proof regarding this fact-specific inquiry.

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[5] The Eighth Circuit explicitly did not address whether *Hurley* protects a state actor's speech, stating:

> Whether a private entity like Salute forfeits some of its right to deliver its own message unimpeded by others when it assumes the role of state actor need not be decided on this record because Salute has not shown that the injunction infringed its own ability to deliver its chosen message.

Pet. App. 17a. Hence, this Court need not resolve the question of the applicability of *Hurley* to private speakers deemed to be state actors under Section 1983 because, assuming *arguendo Hurley* is applicable, Salute has not proven its speech rights were violated.

In *Hurley*, this Court held that the private entity – the parade organizer – had a First Amendment right to control its message, "which was communicated by the composition of the parade." Pet. App. at 16a, *citing*, *Hurley*, 515 U.S. at 566. This Court did not suggest, however, that a parade organizer could control the speech activities of those watching the parade. Recognizing this distinction, the Eighth Circuit, like other United States Courts of Appeal,[6] analyzed whether *Hurley* provides the organizer of a large public event a First Amendment right to prohibit all disfavored speech activities at that event.

The Eighth Circuit's opinion did not rest upon a finding that the air show was more like a shopping mall than a parade, as Salute contends at page 19 of its petition. Instead, the Eighth Circuit's first order of business, consistent with the *Hurley* analysis, was to determine the boundaries of Salute's speech. On that issue, the court concluded that, unlike the parade in *Hurley*, the open areas of the expansive air show grounds were not part of Salute's speech because Salute failed to show "that its message was dependent upon the composition of the crowd . . ."[7] Pet. App. at 17a. Because Salute did not

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[6] *See, e.g.*, *Mahoney*, 105 F.3d 1452, where the D.C. Circuit found that the government could not interfere with a parade viewers' speech rights; *Gathright*, 439 F.3d at 577, where the Ninth Circuit held that a proselytizer could engage in speech activities at a privately run event open to the public because "[m]erely being present at a public event does not make one part of the event organizer's message for First Amendment purposes.") (citations omitted).

[7] Without citing any record evidence, Salute claims at various points in its petition that the crowd at the air show gathers together for the common purpose of honoring veterans. Given the tens of thousands of people that attend this fair-like event (Pet. App. 2a and 24a), Salute's presumption regarding others' intentions does not constitute evidence.

(Continued on following page)

establish this fact, which would have made those in the open areas of the air show more comparable to a parade participant, the panel next considered whether allowing speech in the open areas of the air show would somehow impede Salute from delivering its chosen message.

In conducting this analysis, the Eighth Circuit did not create new tests or exceptions to *Hurley*, as Salute suggests in its petition (pp. 19-20). Instead, by assessing whether outside speech activities would disrupt or dilute the event, the court merely considered whether the evidence supported a conclusion that the public's speech would in fact alter, i.e., interfere with or appear to be Salute's speech – an analysis supported by established law. Indeed, in *FAIR* this Court characterized the constitutional violation in *Hurley* as "result[ing] from the fact that the complaining speaker's own message was *affected* by the speech it was forced to accommodate." 126 S. Ct. at 1309 (emphasis added). Applying this reasoning, the *FAIR* Court found that the plaintiff law schools could not avoid association with military recruiters by asserting free expression rights, noting that even high school students "can appreciate the differences between speech a school sponsors and speech the school permits because legally required to do so." 126 S. Ct. at 1310. Likewise, in *Prune-Yard*, this Court held that a state law that protected the collection of signatures at a private mall was constitutional because the mall was open to the public and solicitations

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Instead, as the district court concluded, "[t]he Air Show is a fair like event that entertains and educates and provides a good crowd for Memorial Day ceremonies." Pet. App. 36a.

were unlikely to be perceived to be those of the owner. 447 U.S. at 87.[8]

As the Eighth Circuit found, given that the crowd was not part of Salute's message, Salute had the burden to prove that nondisruptive, expressive conduct would otherwise interfere with or be perceived as Salute's message. Pet. App. at 17a. Salute failed to meet its evidentiary burden.[9] Pet. App. 17a-18a. As a result, the Eighth Circuit correctly applied existing precedent to the facts of this case; and the record evidence provides no basis for this Court to reexamine or clarify *Hurley* as Petitioner requests.

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[8] *See also*, *Parks*, 395 F.3d at 651 (proselytizer had right to engage in speech at art festival where it did not interfere with or prevent art festival's message).

[9] Salute also cites *Hawkins v. City and County of Denver*, 170 F.3d 1281 (10th Cir. 1999), for the proposition that a state actor can restrict speech activities in a non-public forum. Salute did not appeal the district court's finding that the speech activities at issue must be allowed at the air show despite its non-public forum status, nor did Salute raise this as an issue in its petition for writ of certiorari before this Court. Therefore, this case provides no support for Salute's petition.

CONCLUSION

The present case does not warrant this Court's grant of certiorari because the Eighth Circuit correctly applied this Court's precedents, its decision is not in conflict with any Court of Appeal decisions and its decision pivots on a very fact-specific inquiry. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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2007

No. 07-142

IN THE

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE TO VETERANS CORPORATION, PETITIONER

v.

BILL WICKERSHAM; MAUREEN DOYLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF

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STATEMENT

Contrary to respondents' statements at page 3 of their brief:

The City is **not** responsible for operating the airport during the air show. Although the airport is owned by the City, the contract between Salute and the City gives Salute exclusive control of the airport during the event, subject to the City's right to retake control in the event of an emergency. Pet. App. 3a.

The City does **not** coordinate with the Federal Aviation Administration ("FAA"), and the City does **not** have primary responsibility for the "Ground Operations Plan." Salute, not the City, must submit the Ground Operations Plan to the FAA. Pet. App. 68a. Salute, not the City, appoints the "Air Boss," who is a qualified volunteer and not a City employee. The airport manager and other key people such as the air traffic controller, FAA representative, fire chief, and police captain attend the Air Boss briefings. App. 69a. But the briefings are not City meetings, and they are not attended by City administrators or council members. The briefings occur early in the morning of Saturday and Sunday of the Memorial Day weekend, shortly before the air show begins. Posner Depo. at 114. The Air Boss briefings are nothing more than coordination sessions, not policy-making meetings.

The City does **not** coordinate with the Department of Defense for military aircraft. Salute is solely responsible for the preparation and filing of the DD Form 2535, "Request for Military Aerial Support," with the Department of Defense. Exhibits 6 and 7.

Salute is the official "Sponsor" of the air show on the DD Form 2535s, and the City merely certifies the airport as the site and provides normal public safety services.

The City does **not** arrange public transportation to and from the airport for Salute. It was undisputed that a private contractor, "First Student Transportation," owns and operates the school buses that are used as shuttles to the air show. Posner Depo. at 240. There was no evidence that the City contracted for the buses or paid the private contractor anything to operate the buses during the air show. Invitees pay $2 for shuttle bus service. Exhibits 6 and 7.

Two other matters deserve a brief comment. At page 5 of their brief, respondents refer to testimony by Capt. Martin about going so far as to remove someone on account of race. That was a thoughtless answer to a hypothetical question that Capt. Martin recanted in his later testimony. He was never asked to remove anyone on account of race. Salute has never discriminated on the basis of race. Many of its honored guests are African-American veterans. Race is not an issue in this case.

The fact that the air show is open to the public without charge does not mean that the invitees are free to do whatever they want on the fenced tarmac.[1] Military air shows are also open to the public free of charge, but there are strict rules in place, and anyone who breaks the rules is escorted off the air show

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[1] In this brief, petitioner is using the term "fenced tarmac" instead of "secured tarmac." The terms mean the same thing, but the former may be more indicative of the fact that a fence separates the air show from the other public areas.

grounds and given an exclusion letter by the base commander.

ARGUMENT

In their brief, respondents attempt to marginalize Salute's points by trying to turn the case into a factual dispute. Salute is not seeking fact bound error correction. Based on the undisputed, relevant facts, the appeal would have been decided in Salute's favor if it had been in the Fourth of Sixth Circuits. Salute would not be a state actor for purposes of 42 U.S.C. §1983 under either *UAW Local 5285 v. Gaston Festivals*, 43 F.3d 902 (4th Cir. 1995), or *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000).

On the *Hurley* issue, the Eighth Circuit decision denying protection to Salute's First Amendment right to its own message is not "in line" with decisions of the Sixth, Ninth and D.C. Circuits. Respondents' resort to "crowd" analysis misses the point and ignores the fact that the fenced tarmac is at the heart of the air show and part of the Memorial Day message.

I. Petitioner is not seeking fact bound error correction. The decision of the Eighth Circuit would have been opposite on the state action issue if the appeal had been to the Fourth or Sixth Circuits.

Taking the Sixth Circuit decision first, the factual parallels between the *Lansing* opinion and the case at bar are exceedingly close. In both, the non-governmental organizer ("NGO") leased public property for an annual, themed event. In both, the NGO had rules against other expressive activities

inside clearly marked boundaries for the event area. In both, expressive activities on public property immediately outside the event boundaries were not restricted in any way. In both, the plaintiffs went inside the marked boundaries for the purpose of expressing messages not consistent with the event's theme. In both, a city policeman enforced the NGO's rules against other messages inside the event boundaries. In both, the city retained authority over public services, such as fire and police protection. In *Lansing*, there was even more extensive involvement by public officials in governance. Two of them were on the NGO's governing board. There were and are none on Salute's governing board. Based on all these facts and circumstances, the Sixth Circuit held that the NGO was not a state actor for purposes of 42 U.S.C. §1983.

The Fourth Circuit's decision in *Gaston* is also at odds with the Eighth Circuit, in spite of respondents' attempts to distinguish it. The issue in *Gaston* was whether the NGO engaged in state action when it organized and managed the annual "Fish Camp Jam" festival. The NGO denied booth space to the UAW, which meant the UAW could not pass out leaflets on the festival grounds. Despite evidence of extensive municipal involvement and support, including police services, the court found that the NGO was not a state actor under 42 U.S.C. §1983. The fact that the city issued a permit for the use of the public property and retained the right to re-enter, just as the City of Columbia did in the instant case, showed that the NGO was not a state actor. 43 F.3d at 910. The fact that the union members were able to freely distribute leaflets outside the festival grounds, just as respondents were allowed to do in this case, was a significant factor in

holding that the NGO was not engaged in state action. Id.

At page 14 of their brief, respondents state that the plaintiff in *Gaston* conceded the absence of a close nexus and cite footnote 4. But they failed to quote an important phrase in footnote 4 that says: "as this case is presently postured," there is an insufficient nexus. 43 F.3d at 909, n. 4. The term "presently postured" referred to the fact that the UAW had argued that the event itself was a governmental function. For strategic reasons, they did not try to mix a nexus argument with this.

In any event, footnote 4 in *Gaston* is irrelevant because the Eighth Circuit did not base its decision on a pure nexus analysis for the air show as a whole. Its state action holding was based on the conclusion that "Salute and the city were knowingly and pervasively entangled in the enforcement of the challenged speech restrictions...." Pet. App. 15a. In other words, it was all about the police. On that ground, the Eighth Circuit decision is in direct conflict with *Lansing* and *Gaston*, both of which recognized that the police can provide services without making the NGO a state actor. 202 F.3d at 831 & 833; 43 F.3d at 909.

In the final analysis, no one test is determinative. The Court looks to the totality of the circumstances. Viewed in that light, the conclusion is inescapable that if the Memorial Day air show were in any of the states within the Fourth or Sixth Circuits, Salute would not be a state actor and the protestors would be outside the fenced tarmac, where they always were before this suit was filed.

The five cases cited by respondents from the First, Seventh and Ninth Circuits do not support their argument and are certainly not "precisely in line" with

the Eighth Circuit decision, as respondents contend at page 8 of their brief. Each of the five cases cited by respondents will be distinguished in turn.

In *D'Amario v. Providence Civic Center Auth.*, 783 F.2d 1 (1st Cir. 1986), a divided court held that enforcement of the "no-camera" rule for performances at the publicly owned and publicly operated Providence Civic Center supplied the state action nexus for jurisdiction under 42 U.S.C. §1983. The majority opinion based its holding on evidence that the venue was owned and operated by a public corporation, the Providence Civic Center Authority, and that it was the Authority's governmental employees who enforced the challenged rule. Contrast this with Salute's status. It is a private corporation, and its volunteers are not governmental employees.

Air Line Pilots Assoc. v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995), is also easily distinguished. The forum in *Air Line Pilots* was the display cases at the Chicago O'Hare airport. The pilots union wanted to display a message critical of United Air Lines. The contractor in charge of the display cases, TMI, refused, on direct orders from the City (under pressure from UAL). State action exists when the government exercises coercive power. *Id.* at 1150. In contrast, there was no coercive power exercised by the City of Columbia over Salute. Keeping extraneous messages out of its Memorial Day event was Salute's idea, not the City's.

Lee v. Katz, 276 F.3d 550 (9th Cir. 2002), was a §1983 action by street preachers to enjoin the Oregon Arena Corporation ("OAC") from enforcing a rule against preaching at the city-owned Rose Quarter Commons, a large open-air plaza. OAC conceded that the Commons was a traditional public forum, which

made the regulation of speech a public function. *Id.* at 556. This is not the rule for a nonpublic forum, like the City of Columbia's fenced tarmac during the air show. In a nonpublic forum, regulation of speech at a themed event by an NGO is not a public function.

ACLU v. City of Las Vegas, 333 F.3d 1092 (9th Cir. 2003), is not in point, because the state actor status of a private entity was **not** at issue. The City of Las Vegas had permanently converted five blocks of Fremont Street into the "Fremont Street Experience," placed the area under the control of the Fremont Street Experience, LLC ("FSELLC") and prohibited unapproved expressive activities by others. The primary issue on appeal was whether the "Fremont Street Experience" had turned a traditional public forum into a nonpublic forum (the circuit court held that Fremont Street was still a traditional public forum). The status of FSELLC was not in dispute. "Neither party contests the premise that FSELLC is a state actor,..." *Id.* at 1098, n. 5.

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983), held that a landlords' use of the police to evict tenants from a trailer without judicial process made the landlords a state actor. The landlords used the police presence to cloak themselves with state authority. The result was in line with decisions of this Court holding that police aid in a repossession of property constitutes state action. Nothing remotely close happened during the Memorial Day air show.

II. The fenced tarmac during the air show is at the heart of the event and is an integral part of the Memorial Day message. It is not like a sidewalk next to a parade. The "sidewalk" in this case is the area outside the fence.

How one frames the ultimate facts in a First Amendment case will frequently determine the outcome. That is why this Court will undertake its own independent review of the facts. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

In point II of their brief, pages 18 to 20, respondents argue that Salute is not entitled to First Amendment protection for its Memorial Day theme on the fenced tarmac because that area is akin to a sidewalk by a parade. This argument overlooks substantial differences. There are static aircraft displays on the fenced tarmac. Pet. App. 2a. The solemn noontime ceremony to honor fallen veterans is on the fenced tarmac. Pet. App. 3a. The national anthem is played on the fenced tarmac. Id. Honored guests, such as the Tuskegee Airmen, are introduced and honored on the fenced tarmac. Id.

To say that the fenced tarmac is not part of the air show is like saying the exhibition area is not part of a convention. To bring the issue closer to home, how would the American Bar Association have reacted if people opposed to the rule of law had invaded the exhibition area in the Muscone Center in San Francisco at the recent ABA Annual Meeting and demanded the right to leaflet, petition, and engage in other expressive activities at odds with the ABA's core values? Even though the Muscone Center is public property, would any reasonable person buy into the argument that the

plenary sessions were the "parade" and therefore the display areas were the "sidewalk," open and available for a First Amendment free-for-all?

Respondents' argument at page 20 of their brief that "the crowd was not part of Salute's message" is at odds with this Court's focus on the forum, not the "crowd." The argument also ignores the undisputed facts in this case. Respondents were not barred from being part of a non-expressive "crowd." They became expressive units when they went onto the fenced tarmac for the express purpose of espousing messages either at odds with or extraneous to the Memorial Day theme. As such, they tried to make themselves part of the "parade" that Salute sponsored.

None of the cases cited by respondents support their position under Point II. In *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005), the plaintiff was allowed to preach in the streets, because the streets remained a traditional public forum during an arts festival. The fenced tarmac is a nonpublic forum. *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006), was another case filed by a street preacher, to secure his right to preach in a traditional public forum. *Mahoney v. Babbit*, 105 F.3d 1452 (D.C. Cir. 1997), protected the right of people on the sidewalk to hold protest signs along a parade route. *Mahoney* stands for the proposition that respondents should be outside the fenced tarmac, as in former years.

CONCLUSION

The Memorial Day air show has a theme in keeping with the national holiday to honor and remember veterans. Activities on the secured tarmac are part of the air show. Petitioner and other non-governmental organizers of public events across the nation should be allowed to sponsor the same or similar events without the intrusion of other messages and without becoming state actors under 42 U.S.C. §1983. This is a matter of national interest and importance, and non-governmental organizers of air shows and other themed events across the country are in need of review by this Court, to bring the Eighth Circuit in line with the well-reasoned opinions from the Fourth and Sixth Circuits. Respectfully, certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MEMORIAL DAY WEEKEND SALUTE TO VETERANS CORPORATION, PETITIONER

v.

BILL WICKERSHAM; MAUREEN DOYLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE

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STATEMENT OF INTEREST[1]

The International Council of Air Shows, Inc. ("ICAS")[2] is the pre-eminent organizational representative for the air show industry. ICAS has approximately eight hundred sixty-five (865) members including air show performers, air show organizers and support services. Members of ICAS include political subdivisions, corporations and individuals within and without the United States. Among the organizers of air shows in the United States are U.S. military installations, a number of municipal or county airport authorities, city chambers of commerce, air museums, city or community convention and visitors bureaus and private flight clubs.

There are between three hundred (300) and three hundred twenty-five (325) air shows in the United States each year. Of those, approximately forty (40) are held on U.S. Air Force bases. Approximately fifteen (15) are held at U.S. Navy installations.

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[1] Pursuant to Supreme Court Rule 37.2(a), ICAS states that Petitioner and Respondents have given consent to the filing of this Amicus brief. A letter from the Petitioner giving that consent has been duly filed with the Clerk of this Court. Respondents' attorney has advised that Respondents' written consent shall be filed on or before the date Respondent's response to the Petition is due. In accordance with Supreme Court Rule 37.6, ICAS states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amicus, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] ICAS was organized in 1968 under the laws of the state of Wisconsin. It qualifies as a 501(c)(6) non-profit trade association. It maintains an address on the "World Wide Web:" www.icashq.org.

Approximately four (4) are held at U.S. Marine Corps facilities. The balance of two hundred forty (240) or more air shows each year are civilian shows held principally at general aviation airports throughout the country. With only rare exception, those non-governmental air show organizers will rely on governmental law enforcement authorities for crowd control and overall preservation of the peace at their sponsored events.

A question presented by this case is whether non-governmental organizers of air shows or of any publicly attended event become "state actors" for purposes of 42 U.S.C. §1983 if the organizers involve federal or state agencies in the planning of their events, or rely on public services such as police protection during the event. Other questions are whether those event organizers have the right to their own themes or messages for their events, or can they be compelled to accept contrary views at the same place and time. The questions presented are critically important to ICAS and its membership.

ICAS estimates that average attendance at air shows held in the United States is 25,000 to 30,000 people per event. That average takes into account very small shows of 3,000 or 4,000 attendees to very large shows where 150,000 or more attend. Attendance at air show events has risen for the last fifteen years.

If the Eighth Circuit Court of Appeals decision below is not reversed, many ICAS member air show organizers will likely qualify as "state actors" which in turn will affect thousands of people who attend air shows each year. Because ICAS represents a broad

spectrum of interests within the aviation community, its perspective on the issues in this case should be helpful to the Court.

ICAS fully supports an air show organizer's choice to advertise, promote and conduct its air show under the banner of a patriotic or other similar theme.[3] ICAS also supports, and indeed encourages, the enlistment of volunteers for every aspect of an air show performance from preliminary planning to performance scheduling and daily supervision. Moreover, it is apparent to ICAS that Petitioner's annual Memorial Day celebration, which involves over 3,000 volunteers, and which honors and reveres the nation's veterans,[4] combined with the generosity of Petitioner's underwriters, a generosity which is extended to eager thousands who attend the air show each year, are model ingredients for the successful air show and lend themselves well to the objective of promoting the air show as a popular event in North America, one of ICAS's corporate purposes.

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[3] Some ICAS member air show organizers already suggest themes in their own names. For example American Heroes Air Show Network, the California Black Aviation Association, Vidalia Onion Festival Air Show, Wings of Remembrance, Inc., are ICAS member air show organizers.

[4] The Petitioner's event is often singled out to ICAS and its staff as distinctive in its emphasis on and commitment to recognizing both current and former veterans of military service. The historic attendance levels at Petitioner's event are a testament to the enduring appeal of this theme.

STATEMENT

Amicus adopts the statement of the case supplied by the Petitioner. (Pet. 7-10). Petitioner is a private corporation whose purpose is to honor and remember veterans on Memorial Day. It organizes an annual air show at the Columbia Regional Airport, Columbia, Missouri, making use of the skills of approximately 3,000 volunteers. It occupies the air field pursuant to a contract with the City granting it control over the area. Up until the injunction entered by the District Court, the Respondents engaged in protests at the annual air show outside the gates of the secured airport tarmac where no rules are imposed. Inside the secured tarmac, Petitioner disallows commercial solicitation, leafleting, petitioning, political campaigning and unauthorized signs. City police are responsible for insuring the peace at the event, and carefully plan for the crowds, and if a guest violates the rules of admission, the police deal with that by enforcing the laws against trespass.

The Eighth Circuit Court of Appeals[5] affirmed the District Court's[6] entry of injunctive relief which chiefly enjoined Petitioner from enforcing its rules against leafleting and unauthorized signs. In affirming the District Court, the Eighth Circuit concluded that Petitioner was a "state actor" because of the city police role in enforcing Petitioner's rules and because of City participation in planning and operating the air show.

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[5] The case is reported at 481 F. 3rd 591. It is referred to herein for convenience as the "Eighth Circuit Decision."

[6] 371 F.Supp. 2nd 1061.

REASONS FOR GRANTING THE PETITION

This case involves protections afforded not only to individuals but also protections afforded organizers of public events under the First Amendment to the United States Constitution. The Eighth Circuit Decision shows that there is a deep and obvious split in the Courts of Appeals on what constitutes a "state actor" under 42 U.S.C. §1983. As the Petition shows, the Courts of Appeals border on disarray in articulating the proper elements of a "state actor," and clarification of this status is vital to judicial interpretation and application of the Civil Rights Act of 1871 to non-governmental organizers of air shows and other public events. This Court's review and reversal of the Eighth Circuit Court of Appeals will end the conflict between the circuits and bring needed consistency and guidance to the judiciary and event organizers.

The world of aviation supplies an elaborate gallery from which ICAS member organizers can select their themes and messages, and all could qualify as inherently expressive speech.[7] Invariably, those

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[7] Burning the flag of the nation is considered inherently expressive speech under the First Amendment. *See, Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* , 547 U.S. 47, 126 S.Ct. 1297, 1310 (2006), citing with approval *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533 (1989). Likewise, saluting the flag and honoring those who have defended it over the history of our nation, which are conspicuous activities conducted as part of the theme of Petitioner's air show, are indisputably inherent expressive methods of speech warranting protection under the Amendment. Certainly, the Petitioner's speech was **at least** as expressive as the parade honoring St. Patrick in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, (1995) another of Petitioner's principal citations. (Pet. at 19). One would hope that

themes and messages are tailored to have their most effective broadcast when joined with the pageant of modern aircraft and aerobatics. The ability of an organizer to champion a theme or message within the context of a publicly attended air show without sharing the same field with persons who oppose that message is gravely weakened, if not utterly denied, by the Eighth Circuit's Decision.

Under the shadow of the Eighth Circuit Decision in this case, non-governmental event organizers who anticipate extensive public attendance must struggle with whether they constitute "state actors" who face extraordinary liability if they rely on governmental enforcement authorities to prohibit trespass based on violations of their rules.

It would come as a complete shock and surprise to many air show organizers who occupy government owned airports under permit, lease or contract for a one or two day event that because police protection is provided for the performances, the organizer is now converted to an agent of the state itself and subject to liability under the remedy supplied by 42 U.S.C. §1983 for restricting leafleting within the fenced in confines of the air show theater.

This is a classic case for the Court's review. Reversal of the Eighth Circuit Decision is of cardinal importance.

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for purposes of the First Amendment our nation's flag and the veterans who defended it would be on par with this special saint.

I. THE COURT SHOULD REJECT THE COURT OF APPEALS' DETERMINATION THAT PETITIONER IS A "STATE ACTOR."

The Eighth Circuit Court of Appeals' concept of a "state actor" under 42 U.S.C. §1983 is in startling conflict with indistinguishable decisions of the 4th and 6th Circuit Courts of Appeals, and the Petition makes that plainly evident. (Pet. at 11-16.) Amicus will not repeat Petitioner's arguments but will emphasize here that as the facts of this instant case will support, Petitioner was no more connected with the state than the private organizer of the "Memphis in May" festival in *Lansing v. City of Memphis*, 202 F. 3rd 821 (6th Cir. 2000) or the private organizer of the festival targeted in *UAW, Local 5285 v. Gaston Festivals, Inc.*, 43 F.3rd 902 (4th Cir. 1995). The need for harmonizing the lower courts on this important issue could not be more apparent.

A. *The Price of Admission*

Unlike Petitioner, many ICAS member organizers charge an admission fee for the privilege of attending an air show event. Like Petitioner, those organizers will generally engage multiple federal and state agencies in the planning of their events such as the Federal Aviation Administration. Participation by this particular federal agency in the planning of air show events is not merely common but absolutely essential. In the planning phase, air show organizers may also involve the Department of Defense, various branches of the military service, municipal airport management, fire protection and waste disposal agencies. They may need to acquire permits from governmental health departments, waivers from

federal and state aviation regulators and inspections from all of the above. And they will customarily rely on local law enforcement to patrol the secured area of the air show to assure that those who attend will comply with the scope of the invitation. This degree of contact with governmental authorities is expected from ICAS members. As the principal provider of training in the air show industry, ICAS constantly teaches and reinforces the importance of working closely with local and federal law enforcement and regulatory agencies to de-conflict and make sure that the event is conducted without incident.

The Eighth Circuit Decision would label the air show organizers just described as "state actors" for purposes of the remedy provided by §1983. Does that moniker change if the organizer charges an admission fee? Is the admission fee inimical to rights protected under the First Amendment?

In a number of cases, this Court has ruled that constitutional violations may arise from the deterrent, or "chilling," effect of governmental rules that do not directly prohibit the exercise of First Amendment rights. *See, Laird v. Tatum,* 408 U.S. 1, 11, (1972) and cases cited therein. Under this line of cases, can the air show organizer bar entry to someone who refuses to pay the admission fee even though he or she professes to have the right to express protected speech within the secured area? If not, does the organizer have the authority to determine at the gate which individuals have inherent expressive speech protected under the First Amendment such that the admission fee must be waived? At what point will the organizer's right to control access to the secured area and cover the

expense of the event, and the rights of dissidents to express speech in the same area, be balanced? These questions lay waiting in the background as long as the Eighth Circuit Decision below has continued vitality.

B. *Considerations of Safety*

ICAS's corporate purposes include maintaining "a constant vigil on air show safety in cooperation with appropriate regulatory agencies;" and educating "its members through programs that promote safety, professionalism, showmanship and economic viability."

Amicus will not neglect these corporate purposes, and must raise the issue of safety with the Court. The District Court and the Eighth Circuit below ostensibly considered safety issues air show organizers confront for their performances. Organizers must be constantly vigilant in the control and disposal of debris around performing and even static displayed aircraft. Leafleting and the carrying of signs bearing protected speech may be relatively benign from a safety standpoint but Amicus has not had a meaningful opportunity to investigate this matter with all of its members. Suffice it to say, an additional hazard should not be added unnecessarily to the mix of dangers air show event organizers contend with already. Reversal of the Eighth Circuit's decision would eliminate completely any thought of contingent planning for leaflet disposal, restrictions on sign carrying, size or display, or sectioning part of the air field's secured area for purposes of fixing the locus of protected speech activities.

Moreover, it would be perilous if event organizers decided to limit their involvement with government authorities as a result of the Eighth Circuit Decision. Would an organizer's reliance on private security personnel to enforce the rules of conduct in the secured area be enough to allow the organizer to escape becoming a "state actor?" Would those private security personnel be adequately trained to handle a terrorist threat at the event, or have sufficient staff for patrols and the stationing of guards? The Eighth Circuit Decision may very well have the effect of separating organizers of not only air show events, but any other private group, from governmental agencies in the planning and holding of their sponsored events. It is difficult to imagine a Saturday morning bicycle race without the involvement of local law enforcement officials on traffic issues, yet if every private organization that uses a government owned or operated property or utilizes enforcement services from local police is instantly labeled a "state actor," there will be substantial consequences to this sea change in the interpretation of §1983.

II. THE COURT SHOULD APPLY THE PRINCIPLES IT ANNOUNCED IN *HURLEY*. PETITIONER AND ORGANIZERS OF LIKE AIR SHOWS CANNOT BE COMPARED TO COMMERCIAL SHOPPING VENUES.

The Eighth Circuit cited *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) as a controlling authority for its decision. Petitioner points out accurately that it is inapposite. (Pet. at 19). ICAS agrees with Petitioner that *Hurley v. Irish-American*

Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, (1995) has been ignored in error by the Eighth Circuit, and *Hurley* should govern here.

Air shows are characteristically temporary and circus like. They are akin to festivals, carnivals and fairs that have a limited life but appeal to a great many patrons. Air shows require more planning and detail than a community art festival, but the essential features do not change. The non-governmental organizers of air shows have similar duties to organizers of smaller events but their duties unquestionably involve greater complexities. Nonetheless, it is under the analysis in *Hurley* that air shows like Petitioner's fit precisely.

Petitioner highlights the Eighth Circuit's resort to two rather new tests in interpreting First Amendment matters. The first was whether the Respondents' conduct was shown to threaten Petitioner's message and the second, whether that message was diluted by a ". . .small number of sign carriers and leafleteers at the 2005" event.[8] (Pet. at 20 quoting from Pet. App 17a.) As a consequence of the Eighth Circuit's Decision, the prospect is unsettling but bright that the number of sign carriers and leafleteers arriving at the gates of privately organized air shows in the future will be more than just a few, and the selected

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[8] Only a few of the Respondents apparently exercised the rights under the injunction issued by the District Court, but the Eighth Circuit Decision is an invitation to thousands to engage in like behavior at ICAS member organized events. ICAS, and this Court, cannot pretend that this matter affects obscurities of the First Amendment which will touch just a few people in Missouri and no more.

message or theme of the air show will be horribly distorted, muted or fully lost in the cacophony. Use of these two tests may be a tribute to judicial inventiveness but they have no place under the governing analysis of *Hurley*.

ICAS supports the Petitioner's contentions that the First Amendment should not be interpreted in this setting to compel Petitioner, or those in like circumstances, to create at their own expense a forum in which their own message must be given parity on the same premises with one opposing it. Petitioner should have the right under the First Amendment to control the intensity of its own message or theme within the borders of its secured area, and in exercise of that right, may exclude those who would openly express disrespect or disagreement with that message. Petitioner offers an invitation to the public to engage in an assembly where its message is trumpeted. The invitation is conditional in that those with views contrary to Petitioner's message must leave their own trumpet at the gate where it can be retrieved when they leave.

Finally, ICAS supports the right of any public event organizer like Petitioner to choose who participates in their event and how they participate. Not just Petitioner, but all privately organized air shows, festivals, concerts, Little League games, 10K running races and a host of other events held on or in air fields, stadiums, or thoroughfares under lease or license from their government owner will be adversely affected if the Eighth Circuit Decision is not reversed.

CONCLUSION

For the foregoing reasons the Court should grant the petition for writ of *certiorari*. The Court should also reverse the Eighth Circuit.

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